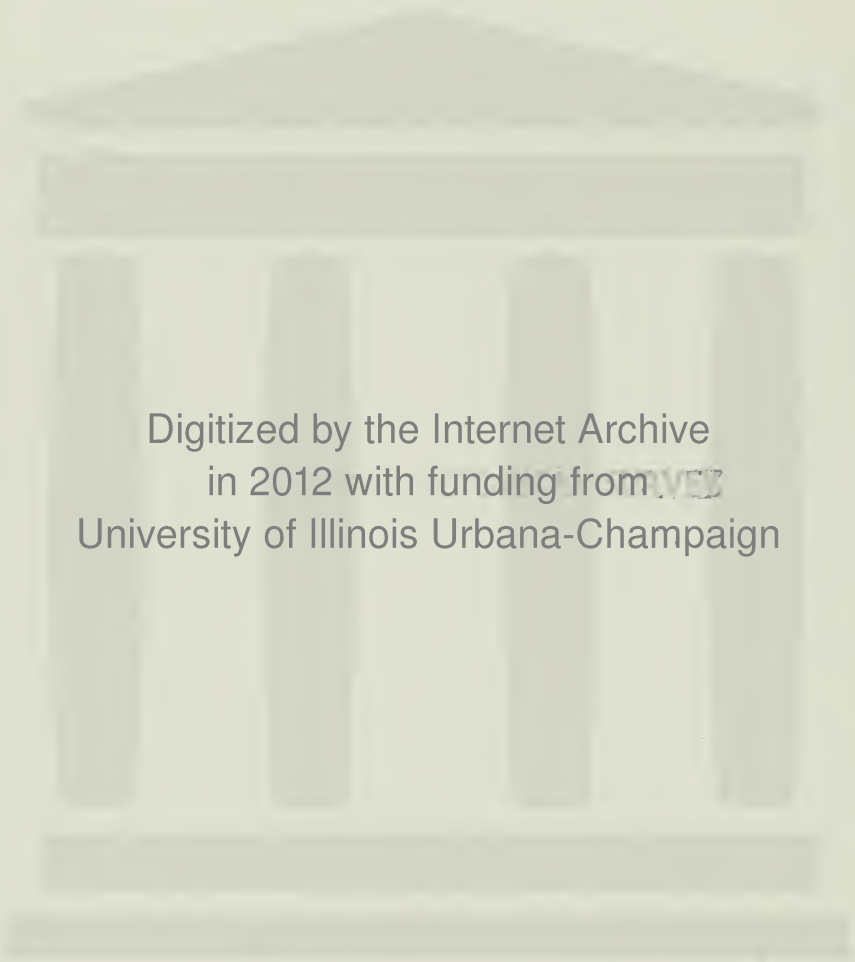

For Marguerite Pease
with highest regards
Arthur Bestor

State Sovereignty and Slavery

A Reinterpretation of Proslavery Constitutional Doctrine, 1846-1860

by

ARTHUR BESTOR

Complete text of a paper to be presented before the Mississippi Valley Historical Association at its meeting in Detroit on April 21, 1961.

To permit full discussion, an abstract only will be read at the actual session.

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ARTHUR BESTOR

State Sovereignty and Slavery

A Reinterpretation of Proslavery Constitutional Doctrine, 1846-1860

Arthur Bestor, professor of history at the University of Illinois and a past president of the Illinois State Historical Society, began working on this subject in 1957 while Harmsworth Professor of American History at Oxford. The book which has resulted from his studies is tentatively titled Slavery and the American Constitution, 1846-1860: A Historical Analysis of the Crisis That Led to Civil War *and will be published by the Clarendon Press of Oxford University. The author presented this paper to the Mississippi Valley Historical Association at its Detroit meeting on April 21, 1961. Earlier versions had been delivered as lectures at Wayne State University, the University of Illinois and the State University of Iowa. A paper on a closely related theme — "The Constitutional Issues of 1860" — was read before the Illinois State Historical Society meeting at Rockford on October 9, 1960.*

IN 1860-1861 ELEVEN slaveholding states proclaimed their secession from the American Union. They were pushing to its logical extreme a constitutional doctrine variously known as "state rights" or "state sovereignty." The doctrine had figured in American constitutional discussion for upwards of sixty years. Moreover, during the controversy over slavery in the territories, which raged for fifteen years, from the time of the Wilmot Proviso of 1846 until the election of 1860, the arguments and slogans of state sovereignty had been reiterated so often that they became almost as familiar (and often seemed almost as ageless) as the Ten Commandments.

Historians take an impish delight in pointing out that the doctrine

of state rights has been espoused on one occasion or another by virtually every section or party or interest that has ever found its opponents ensconced in power in the national capital. As Alexander Johnston put it seventy-odd years ago, "Almost every state in the Union [has] in turn declared its own 'sovereignty,' and denounced as almost treasonable similar declarations in other cases by other states."[1] Most historians stop with this paradox, satisfied that they have reached the end of it. They observe that state sovereignty has made strange bedfellows, but they assume that the doctrine itself, considered simply as a doctrine, has remained essentially unaltered throughout all its changing cohabitations.

In this view of the matter, the theory of state rights, whenever invoked, has had a constant and unvarying tendency. State sovereignty, it is supposed, can always be equated with local self-determination and local autonomy. The doctrine seeks consistently to minimize the exercise of national powers. It is perennially sympathetic to the idea that a state may rightfully "interpose" its authority to prevent the central government's jeopardizing, or even interfering with, the rights or interests or customs of the state's own citizens. According to the conventional view, these three political principles are invariably associated with the idea of state sovereignty. Consequently the doctrine itself must always be looked upon as a purely defensive one, capable of weakening the central authority but by its very nature incapable of being used aggressively or imperialistically.

These assumptions are plausible enough. And the secession crisis of 1860-1861 appears to validate them completely. In defending their course, the seceding states appealed to a political philosophy that exalted local autonomy. "The slaveholding States will no longer have the power of self-government, or self-protection," complained South Carolina in a formal declaration of her reasons for seceding.[2] In an accompanying address she went on to say that "the Government of the United States has become consolidated,

1. "State Sovereignty," in John J. Lalor, ed., *Cyclopaedia of Political Science* (Chicago, 1884), III: 794. See also Arthur M. Schlesinger, *New Viewpoints in American History* (New York, 1922), 220-44, "The State Rights Fetish."

2. "Declaration of the Immediate Causes . . . [of] Secession," Dec. 24, 1860. *Journal of the Convention of the People of South Carolina, Held in 1860, 1861 and 1862* (Columbia, S.C., 1862), 465-66. The ordinance of secession was adopted on Dec. 20, 1860. *Ibid.*, 43.

with a claim of limitless powers in its operations."[3] By seceding from the Union, moreover, South Carolina was obviously interposing the sovereignty of the state in the most conclusive fashion possible. The language throughout was purely defensive. The onus for aggression was placed upon those who would uphold the Union by "coercing" the states.

Secession was obviously the culminating expression of the idea of state sovereignty, and secession can be interpreted as a defensive measure designed to vindicate the philosophy of local self-government. If, then, the doctrine of state sovereignty signified the defensive principles of local autonomy, decentralization, and interposition when invoked to justify secession, must it not have signified substantially the same three principles when earlier invoked, by the very same group, to support their policy regarding slavery in the territories? The answer, contrary to expectation, is *no*. During the crisis of 1846-1860, the doctrine of state sovereignty possessed implications for political philosophy that were almost precisely the opposite of those that had belonged to it in earlier days and that were later hastily reasserted at the time of secession.

One simple fact is often forgotten. Secession was the *alternative* to, not the purposed *outcome* of, the constitutional program that proslavery forces advocated, in the name of state sovereignty, during the controversy over slavery in the territories. This alternative — dissolution of the Union — doubtless lay in the back of the minds of increasing numbers of proslavery leaders as the year 1860 approached. Nevertheless, the actual proposals they were offering from 1846 to 1860 presupposed the continued existence of the federal system. The defenders of slavery wished the constitutional machinery to function in such a way as to give maximum protection to slavery. This meant, of necessity, that they were still committed to the view that the Constitution was a machine that could and should be made to work. Only after they opted for secession did they look upon the old Constitution as a wreck to be dismantled.

In the nature of the case, the reasoning employed to support a positive program for protecting slavery in the territories and for enforcing the fugitive-slave act could not be identical with the reasoning employed to dissolve the Union. Though state sover-

3. "Address . . . to the People of the Slaveholding States," Dec. 24, 1860. *Ibid.*, 470.

eignty might be the premise in both instances, the two arguments were different in purpose and in logic. They were not only different, they were almost antithetical. To attempt to understand the proslavery constitutional argument of 1846-1860 by assuming it to be identical with the secessionist argument of 1860-1861 is to read history backwards and hence to misread it.

On every major point — on local autonomy, on diminution of federal power, and on interposition — the state-sovereignty position regarding slavery was almost exactly the reverse of the state-sovereignty position regarding secession.

Secession represented the principle of local autonomy pushed to its logical extreme. In discussing the question of slavery in the territories, by contrast, proponents of state sovereignty repudiated in theory and practice the idea of local autonomy. It was Stephen A. Douglas who stood consistently for self-determination in the matter of slavery. And the proslavery faction (after an initial period of hesitation) turned against Douglas's principle of territorial sovereignty so decisively that in 1860 they split the Democratic Party rather than accept it.

In the second place, secessionist documents of 1860-1861 denounced the "consolidation" of power in federal hands. By contrast, the proslavery program of 1846-1860 called for rigorous enforcement of the fugitive-slave law by federal commissioners dispersed throughout the Union. By 1860, moreover, proslavery leaders were contemplating the idea of a federally enacted slave code to be imposed in all the territories.[4]

Finally, secession represented an extreme application of the idea that a state might interpose its sovereign authority to render null and void within its borders any controverted exercise of federal power. During the dispute over slavery, however, those who preached state sovereignty had no use whatever for the traditional doctrines of interposition and nullification. Instead, proslavery leaders denounced in the bitterest terms both the nullification of the fugitive-slave act by the personal-liberty laws of various northern states, and also the kind of interposition that Wisconsin attempted in the case of Sherman M. Booth.[5] Though South Carolina had, in 1832-1833, adopted the only formal ordinances of

4. See the resolutions of Jefferson Davis, nn. 116 and 127 below.
5. See nn. 46, 48, and 50 below.

nullification in American history, she did not hesitate to proclaim in 1860 that she considered herself released from all obligations under the Constitution because thirteen northern states had "enacted laws which either nullify the Acts of Congress or render useless any attempt to execute them."[6]

These are not random and accidental inconsistencies. They are evidence that the doctrine of state sovereignty, as applied to the the issue of slavery during the fifteen years before 1860, was by no means the kind of political philosophy it is popularly supposed to have been.

What we are up against is the profound yet subtle difference between a legal concept and a political philosophy. State sovereignty is, at bottom, a *legal* postulate. The idea that government should be decentralized and local autonomy cherished is an expression of political *philosophy*. One naturally assumes a close affinity between the legal concept of state sovereignty and the political philosophy that emphasizes local self-government, just as one naturally assumes a corresponding affinity between the legal concept of national supremacy and the policy of centralization or (in the language of the early republic) "consolidation." In most periods of American history this one-to-one relationship does, in fact, hold. But it does not hold for the constitutional controversy of 1846-1860 over slavery. During that period, conclusions of a markedly consolidationist tendency were regularly being deduced from state-sovereignty premises. How this logical feat was accomplished is the subject of the present paper.

Our concern, let me make clear at the outset, will be with doctrines of constitutional law, not with the purely rhetorical use of the phrases "state sovereignty" and "state rights." Few terms in the political vocabulary are endowed with such deep emotional connotations as these, and few are so variable in meaning. Few, therefore, serve so well the purposes of political rhetoric. A cherished principle can easily be labeled a "right," without imputing to it the status of a claim enforceable at law. Similarly, "sovereignty" can bestow a majestic tone to a political argument, without implying any precisely definable constitutional theory. Arguments about state sovereignty in the full-dress debates preceding the Civil

6. South Carolina, "Declaration," Dec. 24, 1860. *Journal of the Convention,* 464.

War cannot be dismissed, however, as simply rhetorical. Politicians who used the term insisted that it denoted a clear and definite legal conception, that it had precise constitutional consequences, and that the principles deduced from it were legally and constitutionally binding on everyone concerned with the making and enforcing of public policy. Without forgetting the emotional elements in the situation, we must here concentrate our attention upon the legal reasoning that made the controversy a constitutional one.

To understand the constitutional arguments of 1846-1860, it is obviously necessary to know precisely what the constitutional issues were. Moreover, as an essential preliminary, it is necessary to know what they were not.

Abolition of Slavery Not the Issue

The constitutional controversy over slavery that held the nation in its grip from 1846 to 1860 did not result from any proposal before Congress that would have interfered in any way with the complete and final authority of each slaveholding state to deal in any way it chose with any and every question relating to slavery within its own boundaries. No federal measure regulating slavery within the slaveholding states was proposed in Congress or in the platform of any organized political party.[7] No responsible figure in public office questioned the plenary constitutional authority of the slaveholding states to regulate the institution within their borders, and none denied that federal interference would be palpably unconstitutional.

The simple fact that the constitutional powers of the slaveholding states within their own boundaries were never seriously contested is so often blurred in historical discussions, and the opposite has been so often insinuated, that it will be well to place the historical record clearly, though briefly, on view.

Early in the second session of the First Congress, in February and March, 1790, the issue of slavery was brought before the House of

7. Even the Liberty Party of 1844, which presented the most extreme platform of the entire period, stopped short of advocating a federal law abolishing slavery, even though it openly repudiated any obligation to obey the fugitive-slave clause of the Constitution. The party summed up its demands as "the absolute and unqualified divorce of the General Government from Slavery." Kirk H. Porter and Donald B. Johnson, eds., *National Party Platforms, 1840-1956* (Urbana, Ill., 1956), 4-8.

Representatives by a number of petitions urging Congress to "step to the very verge of the power vested in [it]," for the purpose of bringing slavery to an end.[8] In response the House carefully considered the extent of the powers that it believed the newly established government to possess in the matter. After a rancorous debate, two reports, somewhat different in tone though hardly in substance, were ordered spread upon the journal. On the point in question, the decision was clear:

> That Congress have no authority to interfere in the emancipation of slaves, or in the treatment of them within any of the States; it remaining with the several States alone to provide any regulations therein, which humanity and true policy may require.[9]

The principle thus formulated in 1790 remained the unchallenged constitutional understanding until past the year 1861.

Only by amending the Constitution, therefore, could federal power be used to abolish slavery. Amendments to accomplish this end were offered in 1818 and 1839,[10] but the House immediately blocked their consideration. Between 1839 and 1863 — that is to say, throughout the entire period of bitterest constitutional con-

8. Memorial of the Pennsylvania Society for Promoting the Abolition of Slavery, signed by Benjamin Franklin as president, presented Feb. 12, 1790. *Annals of Congress,* 1 Cong., 2 Sess., 1197-98. The previous day two Quaker petitions had inaugurated the discussion. *Ibid.,* 1182-84. (Hereafter, H.R. will stand, in footnotes, for the House of Representatives.)

9. H.R., 1 Cong., 2 Sess., *Journal* (1826 ed.), 181 (March 23, 1790), Report of the Committee of the Whole House. A parallel report by a special committee had ended its discussion of this particular point with an expression of "the fullest confidence in the wisdom and humanity of the Legislatures of the several States, that they will . . . promote . . . every . . . measure that may tend to the happiness of slaves." *Ibid.,* 180. The special committee was appointed on Feb. 12 and reported on March 5; the report was debated for five days (March 16-19 and 22) in a committee of the whole house, which reported on March 22. In the end the House itself adopted neither report but instead voted, 29 to 25, that both reports "be inserted in the Journal" and then allowed to lie on the table. *Ibid.,* 157, 168, 176-81. The various debates on slavery during this session are in *Annals,* 1 Cong., 2 Sess., 1182-91, 1197-1205, 1414-17, 1450-74. See also William Maclay, *Journal . . . 1789-1791* (New York, 1890), 196, 221-22.

10. By Arthur Livermore (N.H.), H.R., April 4, 1818, and by John Quincy Adams (Mass.), H.R., Feb. 25, 1839. Herman V. Ames, *The Proposed Amendments to the Constitution . . . during the First Century of Its History* (American Historical Association, *Annual Report for 1896,* II, Washington, 1897), 334, 349 (items 474, 697-99).

flict over slavery — no proposal to amend the Constitution in this direction was so much as offered, let alone debated. On the other hand, certain amendments to *prevent* the possible abolition of slavery were proposed.[11] Indeed, the only amendment passed by Congress at the culminating moment of the crisis was of the latter character. On March 3, 1861, despite the fact that seven slaveholding states had already seceded, Congress voted to submit to the states an irrepealable amendment to the Constitution, couched in the following unambiguous (if somewhat ungrammatical) language:

> No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State.[12]

This measure, be it noted, was not designed to inflame antislavery opinion and stir up controversy. On the contrary, it was an attempt at conciliation. As such, it was supported by Republicans who, at the very same time, were adamant against any compromise that might permit slavery to enter the territories. In its final form, the amendment was actually introduced by a Republican.[13] Republican votes contributed substantially to the two-thirds majority required for passage by the two houses.[14] The incoming Republican President, Abraham Lincoln, gave the amendment guarded approval in his Inaugural Address, delivered the day after Congress submitted the measure to the states. Pointing out that he considered "such a provision to now be implied constitutional law," Lincoln announced that he had "no objection to its being

11. For example, by John R. J. Daniel (N.C.), H.R., July 6, 1850. *Ibid.,* 354 (item 764). Others are noted, *ibid.,* 193, 195-97.

12. Joint resolution to amend the Constitution, March 2, 1861. *U.S. Statutes at Large,* XII: 251. The inept syntax almost prevented passage. *Congressional Globe,* 36 Cong., 2 Sess., 1364-67 (hereafter cited as *Globe*).

13. Thomas Corwin (Ohio), H.R., Feb. 27, 1861. *Globe,* 36 Cong., 2 Sess., 1263. In debate, authorship was attributed to no less a figure than William H. Seward, about to become Lincoln's Secretary of State. *Ibid.,* 1284.

14. The proposed amendment passed the House, 133 to 65, on Feb. 28, 1861. *Ibid.,* 1285. In the Senate the resolution was debated through most of the night of Sunday, March 3, 1861, the eve of Lincoln's inauguration. It finally passed 24 to 12 — eight Republicans, eight Democrats from free states, and eight members from slave states joining in the affirmative vote. *Ibid.,* 1403 (legislative day, March 2). Party affiliations are in *Tribune Almanac and Political Register for 1861,* p. 17.

made express, and irrevocable."[15] The amendment was actually ratified by three of the states — two of them free — before events crowded it into oblivion.[16]

In supporting this iron-clad guarantee of slavery within the slaveholding states, the Republicans were not abandoning, but were reaffirming, their previously announced position. The fourth plank of their 1860 platform had said:

> That the maintenance inviolate of the rights of the states, and especially the right of each state to order and control its own domestic institutions according to its own judgment exclusively, is essential to that balance of powers on which the perfection and endurance of our political fabric depends. . . .[17]

Lincoln quoted this paragraph in his Inaugural Address, and quoted also a passage from an earlier speech of his own: "I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so."[18]

In view of this record of consistent acceptance by antislavery groups of the constitutional principle that the slaveholding states possessed plenary authority over slavery within their borders, what is one to make of the charge, endlessly repeated, that the opponents of slavery, and the Republicans in particular, believed "that a war must be waged against slavery until it shall cease throughout the United States"?[19]

Part of the answer, obviously, is that such assertions represented sheer distrust and hatred of abolitionists and "Black Republicans," the kind of hatred summed up in De Bow's definition of "Yankees" as "that species of the human race who foster in their hearts lying, hypocrisy, deceit, and treason."[20] Undoubtedly multitudes of men

15. Roy P. Basler, ed., Marion Dolores Pratt and Lloyd A. Dunlap, asst. eds., *The Collected Works of Abraham Lincoln* (New Brunswick, N.J., 1953), IV: 270.

16. By Ohio (free state), May 13, 1861; Maryland (slaveholding), Jan. 10, 1862; Illinois (free), Feb. 14, 1862. Ames, *Proposed Amendments,* 363 (item 931).

17. Porter and Johnson, *National Party Platforms,* 32.

18. *Collected Works,* IV: 263; quoting from his first debate with Douglas, Ottawa, Ill., Aug. 21, 1858, *ibid.,* III: 16.

19. South Carolina, "Declaration," Dec. 24, 1860. *Journal of the Convention,* 465.

20. *De Bow's Review,* XXIII (1857): 209, quoted in J. G. de Roulhac

and women in the seceding states believed that the Republicans, once installed in power, would simply repudiate their constitutional professions and proceed to launch a direct federal attack upon the system of slavery inside the boundaries of the slaveholding states.[21]

Distrust, however, was not the whole of the matter. When

Hamilton, "Lincoln's Election an Immediate Menace to Slavery in the States?" *American Historical Review,* XXXVII (July, 1932): 710.

21. The fact that slavery was, in fact, abolished before the end of the Civil War is sometimes taken as proof of Republican duplicity in 1860-1861. Such a view overlooks the enormous changes wrought in the situation by the coming of war and also disregards the constitutional grounds on which successive actions, from 1862 to 1865, were based. For present purposes, it is the latter point only that calls for discussion. In 1862, the second year of the war, Congress abolished slavery in the District of Columbia and in the territories. Acts of April 16, 1862, chap. 54, and June 19, 1862, chap. 111, *U.S. Stat. at L.,* XII: 376, 432. Both measures were in accord with the avowed constitutional theory of the Republicans.

The most significant step was, of course, the Emancipation Proclamation (preliminary, Sept. 22, 1862; final, Jan. 1, 1863). This did not apply to slavery within the states that were loyal to the Union, but only to specified areas actually in arms against the United States. It did not represent the assertion of a federal power over slavery as such, but was justified solely by military necessity and was made to rest upon the so-called "war powers" of the executive. Lincoln's words were carefully chosen: "by virtue of the power in me vested as Commander-in-Chief, of the Army and Navy of the United States in time of actual armed rebellion against [the] authority and government of the United States, and as a fit and necessary war measure for suppressing said rebellion." *Collected Works,* VI: 29 (for preliminary proclamation, see *ibid.,* V: 433-36). Likewise based upon military necessity was the second confiscation act of July 17, 1862, chap. 195, the ninth section of which gave freedom to slaves belonging to Confederate owners if the slaves escaped to the Union lines or were captured. *Stat. at L.,* XII: 589, at 591.

Throughout the whole period, Union leaders recognized that only a constitutional amendment could permit interference with slavery within the *loyal* slaveholding states. Lincoln proposed such a constitutional amendment, providing for gradual emancipation with federal financial aid, in his annual message to Congress on Dec. 1, 1862. *Collected Works,* V: 529-30. He had outlined the plan in a special message of March 6, 1862. *Ibid.,* 144-46. In the end, of course, slavery was definitively abolished by constitutional amendment — the Thirteenth — introduced on Jan. 11, 1864, reported in amended form by the judiciary committee of the Senate on Feb. 10, 1864, passed by the Senate on April 8, 1864 and by the House on Jan. 31, 1865, and proclaimed a part of the Constitution (after ratification by three fourths of the states) on Dec. 18, 1865. Ames, *Proposed Amendments,* 366-67 (items 983, 985). The earliest amendments to this effect were proposed on Dec. 14, 1863 — the first of the sort since 1839. *Ibid.,* 366 (items 981-82).

we look carefully at the phrases used by the opposing sides, we discover that their statements were not, as they first appear to be, mutually contradictory. Lincoln's pledge not to "interfere with the institution of slavery in the States where it exists" was simply a pledge not to take federal action against slavery within the confines of the slaveholding states. It did not deny the intention of the Republicans to employ against slavery every power falling within the normal domain of federal action, and did not deny the aim of constricting and hampering the institution "until it shall cease throughout the United States." On the other hand, the charge directed by South Carolina against the Republicans was not necessarily a charge that they intended to abolish slavery by direct federal action within the states. From the proslavery point of view, there was no difference between direct and indirect action. The very fact that a measure was deliberately designed to undermine slavery made it automatically unconstitutional, no matter how indirect the means employed.[22] This difference of viewpoint was the crux of the constitutional controversy of 1846-1860.

Extraterritorial Implications of Slavery

The question at issue — and this is a point of fundamental importance — was not the institution of slavery itself as it existed within the boundaries of a slaveholding state. These formed an impregnable barrier against federal interference, as even the most ardent opponents of slavery were bound to concede. That they did concede the point is proved by the very form the dispute over slavery assumed. The fact that the controversy of 1846-1860 turned on the extension of slavery to the territories (and, to a lesser extent, on the fugitive-slave law) showed that antislavery leaders, far from flouting the Constitution, were showing it a punctilious respect. Had they been disposed, as their opponents alleged, to ride roughshod over constitutional limitations, they would hardly have bothered with the question of the territories or the question of fugitive slaves. If direct federal action against slavery in the states had been constitutionally thinkable, there would have been no reason to fritter effort away on tangential matters involving, not the great mass of bondsmen, but only a scattered few.

22. See n. 99 below.

There was an opposite face to this coin. Had the defenders of slavery, for their part, been confident that the institution was safe behind its state-erected bastions, they too would have had little reason to stake so much on peripheral issues like the territories and the handful of escaping slaves. Their conduct revealed their fears. Slavery, they believed, could easily be imperiled by forces that existed and events that occurred in areas beyond the limits within which the institution was established and protected. On one proposition both sides agreed: that slavery could be dealt a fatal blow by federal policies that were operative only outside the boundaries of the slaveholding states.

The struggle that took place between 1846 and 1860 was a struggle for control over these external policies. It was, in short, a controversy over the *extraterritorial* protection that the institution of slavery was entitled to enjoy. The extraterritorial implications of slavery — seldom described in these terms and seldom analyzed to determine their true nature — provide the indispensable key to an understanding of the constitutional controversy of 1846-1860. To explore the ramifications of this concept is the task before us.

Extraterritoriality is, first of all, a concept of international law. Significant, therefore, is the fact that the extraterritorial claims of the slaveholding states — that is to say, their assertion of a power to take action beyond their own boundaries to repress influences deemed inimical to slavery — were baldly asserted, at the very beginning of the period of controversy, in several diplomatic communications. In 1843 Great Britain was supposedly encouraging the independent Republic of Texas to undertake compensated emancipation. Alarmed by this, the American Secretary of State, Abel P. Upshur of Virginia, sent confidential instructions to the minister of the United States at the Court of St. James's, Edward Everett. Upshur wrote as follows:

> It is quite obvious that slavery could not easily be maintained in a country surrounded by other countries whose Governments did not recognise that institution. The difficulty in the present case would be increased by the fact that those countries would be inhabited by people of the same race with the slave owners, speaking the same language, having the same manners, and in many respects the same institutions. Our slaveholding States are separated from the Canadas by many intervening non-slaveholding States of our Union. Although

those non-slaveholding States are as much opposed to the institution as England herself, yet the Constitution of the United States lays them under obligations in regard to it, which, if duly respected, would secure the rights of the slaveholder. . . .

Texas, however, lies immediately on the border of Louisiana and Arkansas. The slave would have nothing more to do than simply to cross the Sabine or the Red river, and he would find himself a freeman. He would be very sure to profit by the opportunity. All the vigilance which the master could use, enforced even by a harsher discipline than he would be willing to exert, would avail nothing. Within a few years a large proportion of the slaves within reach of the border would seek refuge in Texas; and the remainder would be rendered valueless, by discontent and dangerous insubordination. The slaveholder ought not to submit, and would not submit, to this.[23]

Several weeks earlier Upshur had spelled out what he meant by saying that slaveholders "ought not to submit, and would not submit." In a communication to General W. S. Murphy, American chargé d'affaires in Texas, Upshur described the probable consequences of emancipation in that republic:

Even if this Government should interpose for the protection of the slaveholder, it would be very difficult so to arrange the subject as to avoid disputes and collisions. The States immediately interested would be most likely to take the subject into their own hands. . . . They would assume the right to reclaim their slaves by force, and for that purpose would invade the territory of Texas.[24]

This was an extreme statement of the view that the slaveholding states were justified in attempting to control the internal policies of other states whenever those policies threatened, even indirectly, to affect the institution of slavery adversely. Upshur wished to incorporate this extraterritorial principle into our relations with foreign states, and he appeared even to condone irregular armed incursions to enforce the demand. As applied to states within the American Union, the extraterritorial claim was translated into con-

23. A. P. Upshur to Edward Everett, Sept. 28, 1843 (confidential), in Senate Document 341, 28 Cong., 1 Sess., 34-35.

24. Upshur to Murphy, Aug. 8, 1843. *Ibid.*, 21. Further discussion of the international implications of slavery is beyond the scope of the present paper. On the abolition of the foreign slave trade and on such cases as those of the *Amistad* and the *Creole,* see any of the standard histories.

stitutional language and the hint of violent self-help disappeared. Nevertheless the doctrine still involved the extraterritorial protection of slavery.

The Question of Fugitive Slaves

One extraterritorial right connected with slavery was clearly and explicitly recognized by the written Constitution of the United States. Upshur alluded to it. This was the right of a slaveowner to reclaim a slave who might escape into a free state. The constitutional provision on the subject had so important a bearing on all the extraterritorial claims advanced in behalf of slavery that it should be quoted in full:

> No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.[25]

The most significant fact about the fugitive-slave clause was that it provided for the extraterritorial operation of the laws of the slaveholding states. If a slave escaped from his master, the laws of the state where he had been held in bondage clung to him, no matter to what part of the Union he might flee. With respect to him, the federal Constitution itself automatically annulled any law of a free state that might tend to emancipate him. The fugitive-slave clause was of unique importance to the proslavery argument. Not only was it the only provision of the Constitution that explicitly recognized the slaveowner's right of property in his slave, it was also — and more importantly — the only one that gave any extraterritorial effect to state laws establishing slavery. As such, it provided the indispensable foundation for every other type of extraterritorial claim in behalf of slavery. Whether the number of escaping slaves was large or small made little difference.[26] The fugitive-slave clause must be sustained because its collapse would

25. Constitution of the United States, Art. IV, sec. 2, clause 3. Curiously enough, escape into a free *territory* was covered only by implication. Even the bitterest opponents of slavery, however, declined to split this particular hair.

26. On the controversial question of the numbers involved, see Allan Nevins, *The Emergence of Lincoln* (New York, 1950), II: 489.

mean the collapse of the entire contention that the federal government was bound to safeguard slavery outside the institution's established borders.

The principle at stake was so vital to the proslavery argument that extravagant assertions were constantly made to the effect that the fugitive-slave clause represented a fundamental bargain struck at the time the Constitution was drafted. Thus Lawrence M. Keitt of South Carolina told the House of Representatives that "the fugitive slave clause was put into the Constitution as the price of the splendid cession of the Northwest by Virginia, and as the price of the Government, too."[27] John J. Jones of Georgia insisted that "without such a constitutional guarantee it is evident that the slaveholding States never would have ratified the Constitution."[28] Robert Toombs of Georgia asserted that the obligation to return fugitive slaves, far from originating in the Constitution, "has been a fundamental principle of society for thirty centuries."[29] The facts were rather different. A fugitive-slave clause had been inserted in the Northwest Ordinance of July 13, 1787, *coupled with* a provision prohibiting slavery throughout the entire region.[30] Near

27. Jan. 25, 1860. *Globe,* 36 Cong., 1 Sess., App., 96. Certain principles of the law of contracts explain this insistence that the fugitive-slave clause was an absolutely fundamental constitutional bargain. "Before partial failure of performance of one party will give the other the right of rescission, the act failed to be performed must go to the root of the contract, or the failure to perform the contract must be in respect to matters which would render the performance of the rest a thing different in substance from that which was contracted for." On the other hand, if "a breach . . . deprives the injured party of a benefit of but one of [the] subsidiary provisions or promises," then "he is left to redress his injury by an action for compensation in damages." William M. McKinney and Burdett A. Rich, eds., *Ruling Case Law,* VI (Northport, N.Y., 1915): 926. With the possibility of secession in their minds, proslavery leaders were insisting that failure to enforce the fugitive-slave clause abrogated the whole Constitution. They were outraged by a proposal that compensation for escaped slaves be substituted for enforcement of the fugitive-slave law. See Alexander H. Stephens, *A Constitutional View of the Late War between the States* (Philadelphia, 1868-1870), II: 48-49, 58, 77-79.

28. H.R., April 23, 1860. *Globe,* 36 Cong., 1 Sess., App., 246. The seventh of Jefferson Davis's resolutions in the Senate in 1860 (see n. 116 below) dealt with the fugitive-slave clause "without the adoption of which the Union could not have been formed." *Globe,* 36 Cong., 1 Sess., 2350 (resolution adopted May 25, 1860).

29. Senate, Jan. 24, 1860. *Globe,* 36 Cong., 1 Sess., App., 89.

30. Clarence E. Carter, ed., *Territorial Papers of the United States,* II (Washington, 1934): 49.

the end of the Constitutional Convention, on August 28, 1787, a similar provision for the return of fugitive slaves was proposed and briefly discussed. The next day the clause, slightly altered in form, was adopted *nemine contradicente*.[31] The following year, in the Virginia ratifying convention, James Madison put the clause in a perspective totally different from Toombs's. "At present," he said, "if any slave elopes to any of those states where slaves are free, he becomes emancipated by their laws. For the laws of the states are uncharitable to one another in this respect." The fugitive-slave clause of the proposed Constitution, Madison continued, "was expressly inserted to enable owners of slaves to reclaim them. This is a better security than any that now exists."[32]

The fugitive-slave clause was hardly a fundamental compact, but it *was* a provision of the Constitution, and a failure to enforce it was a quite legitimate grievance. The more conservative leaders of the Republican Party recognized the obligation. "It is scarcely questioned," said Lincoln in his first Inaugural Address, "that this provision was intended by those who made it, for the reclaiming of what we call fugitive slaves; and the intention of the law-giver is the law. All members of Congress swear their support to the whole Constitution — to this provision as much as to any other." Ought anyone, he asked, to "be content that his oath shall go unkept, on a merely unsubstantial controversy as to *how* it shall be kept?"[33]

Lincoln was undoubtedly sincere, but he did not speak in this matter for important segments of his own party. Ardent abolitionists had long gloried in defying and violating the fugitive-slave act. Even before the law was made harsher in 1850, the Liberty Party had declared in its platform of 1844 that the fugitive-slave clause of the Constitution was contrary both to the laws of God and to natural right, hence "utterly null and void," and that it was to be regarded "as forming no part of the Constitution of the United States."[34] After the new fugitive-slave law of 1850 was enacted, open and organized violation of its provisions — through the so-

31. Max Farrand, ed., *Records of the Federal Convention of 1787* (New Haven, 1911-1937), II: 443, 453-54. A slight verbal revision was made on Sept. 15, 1787. *Ibid.*, 628.
32. *Ibid.*, III: 325 (June 17, 1788).
33. *Collected Works,* IV: 263-64.
34. Porter and Johnson, *National Party Platforms,* 8.

called "Underground Railway" and through deliberately publicized slave rescues — became commonplace.

Objections to the Fugitive-Slave Act

It was not defiance of the law, however, but attempted nullification of it, that made the question of fugitive slaves a constitutional issue. And nullification did not mean a total repudiation of the constitutional obligation. It represented, instead, a denial of the constitutionality of the *statute* of 1850 by which the obligation was enforced. There were substantial grounds for such constitutional objection. The fugitive-slave law of 1850 authorized summary procedures lacking virtually all the normal legal safeguards that are summed up in the phrase of the Bill of Rights, "due process of law." Decisions were not to be made by regularly constituted courts but by court-appointed commissioners who exercised simply the powers of a justice of the peace. No jury trial was provided. The only evidence required was the deposition or affidavit of the claimant. The statute ordered that "in no trial or hearing under this act shall the testimony of such alleged fugitive be admitted in evidence." The commissioner who decided the claim would receive, for sending a Negro back into bondage, twice the fee he could collect were he to find the man free. And the commissioner's decision, once made, constituted a complete answer to a writ of *habeas corpus* issued by any court, state or federal.[35] Provisions like these appeared to antislavery men to subvert constitutional rights of a far more fundamental character than any the fugitive-slave clause was designed to protect. Representative James Wilson of Indiana stated the issue clearly:

> But why is this act offensive? It is not in the unwillingness on the part of the people of the free States to permit the rendition of a fugitive slave. . . . Sir, it lies deeper, and far beyond. It is in the conviction that this fugitive slave law comes in conflict with and uproots great fundamental principles, and assumes unwarrantable and dangerous powers. Is this so? Is this true? Examine the law. Does it not recognize an officer unknown to the Constitution? Does it not deny the trial by jury in the issue of liberty? Does it not set at defiance

35. Fugitive-slave act, Sept. 18, 1850, chap. 60. *U.S. Stat. at L.*, IX: 462. The quoted sentence is from the sixth section, which included most of the other provisions mentioned; fees were prescribed in the eighth section.

the sovereignty of the State? . . . . Does it not withhold the great writ of *habeas corpus?* I repeat again, examine the law. For this cause it is that the law has been arraigned and condemned by the people of the free States.[36]

Defenders of the fugitive-slave act of 1850 argued "that the law was not intended to try the right of property, whether the fugitive was the property of the claimant, or whether he was free; that the Constitution did not design that, but that, if there was to be any question about the right of property, it was to be determined in the State whence the fugitive escaped."[37] This answer might be technically correct, but from the antislavery point of view it was quite unsatisfactory. Slave property, James Wilson insisted, should "be reclaimed and surrendered under the same rules of evidence, and with the same restrictions, as other property."[38] Moreover, the right to property was only part of the question; the right to liberty was involved as well. There always existed a possible doubt whether a particular Negro who might be pointed out as a fugitive slave was so in fact. This particular fact, insisted the opponents of the fugitive-slave law, should be judicially determined before the individual was removed from the jurisdiction of a free state and placed on the soil of a slaveholding one, the laws of which made different presumptions. Because the liberty of a man who might be a freeman was at stake, the issue should be tried by jury; and the state of which he might in fact be a bona fide resident ought to be able to protect him against kidnapping by issuing the writ of *habeas corpus.* John P. Hale of New Hampshire summed up the antislavery objection in a speech to the Senate in 1860:

The great mistake of the gentlemen who passed this law . . . is this: they assume at the outset that the man whom they claim is a slave, and they give him no sort of rights as a freeman, but only the rights of a slave after that. That is what I complain of; that you may go into one of the free States under this law, and lay your hand on a man who was born there, has lived there all his life, and if he comes within the description of your *ex parte* affidavits taken a thousand miles off, and [if] you can get a ten dollar commissioner to give a certificate, the

36. H.R., May 1, 1860. *Globe,* 36 Cong., 1 Sess., App., 323.

37. James M. Mason (Va.), Senate, May 25, 1860. *Globe,* 36 Cong., 1 Sess., 2351.

38. *Globe,* 36 Cong., 1 Sess., App., 323.

habeas corpus of the State judiciary lies paralyzed at his feet, and the man who is claimed has to go.[39]

Though the dispute over fugitive slaves was in form a dispute over statutory enactments and their effective enforcement, it was in reality a dispute over the spirit in which the Constitution should be interpreted when rights of different sorts came into conflict. Partisans of slavery could find in the Constitution no provisions that applied in any way to Negroes, save the one provision upholding the right of a slaveholder to his slave. No other constitutional guarantees had any relevance, and to invoke them was deliberate obstructionism. Representative Eli S. Shorter of Alabama put the matter bluntly:

If fugitive slaves are to have the benefit of the writ of habeas corpus and jury trial in the North, the South might as well consent at once to strike out from our Constitution the right of recapture. We want the *substance,* not the mere *shadow* of our rights.[40]

From the antislavery point of view, on the other hand, the rights of persons, especially the right to impartial legal procedures, were guaranteed by the Constitution just as explicitly, and even more comprehensively and absolutely, than the property rights arising from slaveownership. This was, at bottom, what was meant by a "higher law." The idea foreshadowed the more generalized

39. May 25, 1860. *Globe,* 36 Cong., 1 Sess., 2351.

40. H.R., April 9, 1856. *Globe,* 34 Cong., 1 Sess., App., 396. Shorter destroyed whatever foundation his argument might have had, by going on to assert that the federal "fugitive slave law of 1850 *denies* to the slave the right of trial by jury and habeas corpus," and by arguing from this that a state personal-liberty law is invalid because it "*confers* that right upon him, and thereby conflicts with the act of Congress" (italics added). *Ibid.* These contentions cannot be reconciled with any possible theory of the American Constitution, which never treats rights as having been *conferred* by government of any sort. To say that an act of Congress *denied* the writ of *habeas corpus* in peacetime to any persons who might conceivably be entitled to it was to admit the unconstitutionality of the act, in view of the provision of the federal Constitution that the writ "shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Art. I, sec. 9, clause 2. The only argument that could possibly be made to hold water was Taney's, namely that the Constitution regarded "the negro race as a separate class of persons," not "a portion of the people or citizens of the Government," and that it did not intend "to confer on them or their posterity the blessings of liberty, or any of the personal rights so carefully provided for the citizen." Dred Scott v. Sandford, 19 Howard 393, at 411 (March 6, 1857).

mid-twentieth-century doctrine that certain guarantees of the Bill of Rights occupy a "preferred position" in the hierarchy of constitutional values.[41]

This deep-lying constitutional conflict — between the right to property and the right to liberty — was never seriously considered by the Supreme Court while slavery existed. The fugitive-slave act of 1850 was, it is true, upheld by a unanimous court, but in an exceedingly offhand way:

> But although we think it unnecessary to discuss these questions, yet, as they have been decided by the state court, and are before us on the record, and we are not willing to be misunderstood, it is proper to say that, in the judgment of this court, the act of Congress commonly called the fugitive slave act is, in all of its provisions, fully authorized by the Constitution of the United States.[42]

It was not the question of personal liberty but a much more technical question — albeit one of great constitutional importance — that brought the fugitive-slave act before the Supreme Court and occasioned the decision containing the perfunctory sentence just quoted.

Personal Liberty Laws and the Booth Case

The written Constitution was quite clear in upholding the right of a slaveowner to recapture his escaped slave, but it was highly ambiguous in assigning responsibility for making this right effective. The fugitive-slave clause was closely associated with a clause for the extradition of criminals, and this association suggested

41. For a concise discussion of Supreme Court opinions, pro and con, on the idea of "preferred position," see Edward S. Corwin, ed., *The Constitution of the United States of America: Analysis and Interpretation* (Washington, 1953), 789-91.

42. Ableman v. Booth, and U.S. v. Booth, 21 Howard 506, at 526 (March 7, 1859). The Supreme Judicial Court of Massachusetts had upheld the constitutionality of the fugitive-slave law of 1850 shortly after its enactment. Thomas Sims's case, 7 Cushing 285 (April 7, 1851). Two months after the decision in Ableman v. Booth, the Supreme Court of Ohio likewise upheld the act, citing the opinion of the United States Supreme Court, of course, but also independently examining the precedents and arguments. The Ohio court divided three to two, and in the four opinions filed the various constitutional issues involved were given the most thorough consideration they were ever to receive at the hands of any judicial body. Ex parte Bushnell, and Ex parte Langston, 9 Ohio State Reports 77 (May, 1859). With the outbreak of the Civil War, the fugitive-slave

that individual states might be expected to deal with fugitive slaves as a matter of interstate comity. On the other hand, the right to reclaim slaves was a right guaranteed by the federal Constitution, and from this could be inferred both a federal power and a federal duty. In 1842 a majority of the Supreme Court took the latter view, not only upholding the federal fugitive-slave act of 1793 (and paving the way for the subsequent act of 1850) but also asserting that the individual states had no concurrent power (and hence no concurrent responsibility) in the matter.[43] This ruling (by a divided court) was an open invitation to states with antislavery leanings not only to refuse co-operation but also to experiment with statutes — the so-called "personal liberty laws" — that placed every legal obstacle that ingenuity could devise athwart the path of the would-be recoverer of an escaped slave.

These actions by the free states constituted "interposition" and "nullification," in a pure and classic sense. Indeed, the personal-liberty laws stood in a much more direct line of descent from the Kentucky and Virginia Resolutions of 1798 than did any of the ingenious theories elaborated by John C. Calhoun in the late 1820's and 1830's.[44] The personal-liberty laws applied the doctrine of interposition to exactly the kind of situation that, in 1798, prompted

act became almost a dead letter, though it was not finally repealed until June 28, 1864, chap. 166. *U.S. Stat. at L.*, XIII: 200. In the meantime, on March 13, 1862, chap. 40, Congress had expressly forbidden the use of military personnel "for the purpose of returning fugitives from service or labor, who may have escaped from any persons" — including persons in the loyal slaveholding states. *Stat. at L.*, XII: 354. Nominally the latter might still employ civil procedures under the act. Reviewing the issues from the perspective of 1921 (which is not necessarily the perspective of 1961), Allen Johnson reached the conclusion that the fugitive-slave acts were "constitutional in every particular." Johnson, "The Constitutionality of the Fugitive-Slave Acts," *Yale Law Journal*, XXXI (Nov., 1921): 161-82.

43. Prigg v. Pennsylvania, 16 Peters 539 (1842).

44. Calhoun's argument in 1828-1832 for nullifying the tariff diverged, in highly significant ways, from the argument used to justify interposition both in the late 1790's against the sedition act and in the 1850's against the fugitive-slave act. Calhoun was seeking to defend the economic interests of a state, not the freedom of any of its citizens. He and his followers were not arguing that the tariff infringed upon rights guaranteed to individuals by the Constitution; they merely argued that the tariff represented the *misuse* of a power — the "Power to lay and collect Taxes, Duties, Imposts and Excises" — delegated in set terms to the federal government. And South Carolina, following his lead, asserted, on the part of the state, not a mere power to protect its own citizens against the penalties they

Jefferson and Madison to promulgate the original theory.[45] In 1798 and in the 1850's the federal law being challenged was one that, in the opinion of its opponents, not only deprived individuals of personal freedom but also, by its very manner of doing so, violated both the letter and the spirit of specific constitutional guarantees of individual rights. On both occasions the opponents of the measure were thoroughly convinced that the federal courts, in view of their existing attitude, would never rule against the validity of the statute in question. On both occasions, accordingly, opponents of the law argued that it was within the competence of a state to interpose its authority as a shield to protect persons within its own jurisdiction from deprivation of their constitutionally guaranteed personal rights.

The conflict between the constitutional philosophy embodied in the personal-liberty laws of the various northern states and the constitutional philosophy embodied in the fugitive-slave act of 1850 came to a head in the welter of cases that arose, in state and federal courts, out of the rescue of a fugitive slave who had been apprehended by his master in Wisconsin in 1854. The principal figure in the mob that snatched the slave from jail and spirited him off to Canada and freedom was an abolitionist editor named Sherman M. Booth. Prosecuted by federal authorities as a violator of the fugitive-slave act, Booth was twice freed, in 1854 and 1855, from federal custody by writs of *habeas corpus* issued by the Wisconsin Supreme Court, one writ preceding and one following his conviction in a district court of the United States. The Wisconsin judiciary declared the federal fugitive-slave act unconstitutional and argued that unless the state could liberate its own citizens from imprisonment under an invalid statute, then it "would present the spectacle of a state claiming the allegiance of its citizens, without the power to protect them in the enjoyment of their personal

might incur for violation of an allegedly unconstitutional statute, but a power to suspend the law in its entirety and to use the full power of the state "to prevent the enforcement and arrest the operation" of the federal statute. Massachusetts, General Court, *State Papers on Nullification* (Boston, 1834); see p. 29 for the quoted phrase from the nullification ordinance of South Carolina, Nov. 24, 1832.

45. See Adrienne Koch and Harry Ammon, "The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties," *William and Mary Quarterly*, Third Series, V (April, 1948): 145-76.

liberty upon its own soil."[46] Here, succinctly stated, is the original state-rights doctrine of the Kentucky and Virginia Resolutions of 1798.

The various cases, considered together on appeal, were finally decided by the United States Supreme Court on March 7, 1859, with Chief Justice Roger B. Taney speaking for a unanimous court. Taney overruled the Wisconsin judiciary on all points and upheld the supremacy of the federal Constitution and the federal courts so forcefully as "to enhance the federal judicial power to a degree beyond that envisaged even by Marshall and Story."[47] The question of sovereignty was discussed, and the court rejected completely the contention that sovereignty could not be divided, that it inhered in the states alone, and that the federal government lacked its attributes.

On the contrary, Taney argued as follows:

There can be no such thing as judicial authority, unless it is conferred by a Government or sovereignty; and if the judges and courts of Wisconsin possess the jurisdiction they claim, they must derive it either from the United States or the State. It certainly has not been conferred on them by the United States; and it is equally clear it was not in the power of the State to confer it, even if it had attempted to do so; for no State can authorize one of its judges or courts to exercise judicial power, by *habeas corpus* or otherwise, within the jurisdiction of another and independent Government. And although the State of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States.

46. In re Booth and Rycraft, 3 Wisconsin 157, at 176, opinion of Chief Justice Edward W. Whiton (Feb. 3, 1855). See also (for the first writ issued) In re Sherman Booth, 3 Wisconsin 1 (June 7, 1854); and (for a writ that was denied) Ex parte Sherman M. Booth, 3 Wisconsin 145 (July 21, 1854).

47. Corwin, ed., *Constitution . . . Analysis,* 555. The allusions are to Justice Joseph Story's decision in Martin v. Hunter's Lessee, 1 Wheaton 304 (March 20, 1816), and Chief Justice John Marshall's decision in Cohens v. Virginia, 6 Wheaton 264 (March 3, 1821). One might add that Taney's statement of national supremacy was as sweeping as President Andrew Jackson's in his proclamation to the people of South Carolina, Dec. 10, 1832. *State Papers on Nullification,* 75-97. The precedent is apposite because Taney was Jackson's Attorney General at the time, though he did not, it is true, participate actively in the drafting of the proclamation, which was largely the work of Edward Livingston. Carl B. Swisher, *Roger B. Taney* (New York, 1935), 207.

The statesmen who framed the Constitution and the people who adopted it were convinced, said Taney,

> that it was necessary that many of the rights of sovereignty which the States then possessed should be ceded to the General Government; and that, in the sphere of action assigned to it, it should be supreme, and strong enough to execute its own laws by its own tribunals, without interruption from a State or from State authorities.[48]

Taney's argument for the judicial supremacy of the federal government was so sweeping, and his commitment to the idea of divided sovereignty so complete, that at first glance he would appear to have struck a fatal blow at the entire doctrine of state sovereignty. In the long run, so far as constitutional law was concerned, the decision in Ableman v. Booth did have precisely this effect. In any discussion of national supremacy the case is almost certain to figure among the important precedents. And, by the irony of history, it is cited in many recent decisions striking down measures adopted by various southern states (in the name of state sovereignty), as part of their campaign of resistance to racial desegregation by court order in the public schools.[49]

National Supremacy and State Sovereignty

In its immediate historical context — in 1859 and 1860 — the decision in Ableman v. Booth did not, however, convey to the public mind the implication of unqualified national supremacy that it conveys today. The decision was welcomed, naturally enough, by the partisans of slavery. Furthermore, they were conscious of no inconsistency in hailing it as a triumph for their own position. They considered it not a repudiation of the doctrine of state sovereignty but a vindication of one of the most important corollaries of that doctrine — namely, its extraterritorial implications.

The paradox disappears if one pays close attention to the limits

48. Ableman v. Booth, 21 Howard 506, at 515, 517 (March 7, 1859).

49. Notably in Cooper v. Aaron, 358 U.S. 1, at 18 (Sept. 29, 1958). See also the decision of the three-judge federal district court in New Orleans, Nov. 30, 1960, which examined at length the historic doctrine of interposition and rejected it with brusque finality as "an amorphous concept," which was clearly "not a *constitutional* doctrine," but was, "if taken seriously," simply an "illegal defiance of constitutional authority." Bush v. Orleans Parish School Board, 188 Federal Supplement 916, at 922, 926 (Nov. 30, 1960); citing Ableman v. Booth at 225.

within which Taney was careful to confine his argument. It is an error to say, as is often loosely said, that the decision in Ableman v. Booth upheld federal supremacy in a comprehensive or inclusive sense. It upheld federal *judicial* supremacy only, the argument being closely confined to the power of that one branch of government. The limits to federal legislative power *might* have been examined had the constitutionality of the fugitive-slave act been discussed in detail. But Taney dismissed the latter question in a single sentence, devoid of argument or citation. Nothing whatever in the opinion could be taken to imply that the supremacy so sweepingly asserted on behalf of the federal judiciary *vis-à-vis* the judiciaries of the several states had any sort of counterpart in the legislative or executive realm. Quite the reverse. Taney included in his decision an explicit reminder that "it is the duty of the courts of the United States to declare . . . unconstitutional and void" any federal statute that transgressed the Constitution, and he pointed out that the courts, by doing so, would "guard the States from any encroachment upon their reserved rights by the General Government."[50]

Two years before, in the Dred Scott case, Taney had denied to Congress any legislative power whatever in a matter that had become of crucial importance — slavery in the territories. He was by no means reversing his earlier decision. On the contrary, he was buttressing it against attack. In the Dred Scott opinion, Taney had pitted the judicial power against the legislative; in Ableman v. Booth he was exalting the judicial power to new heights.

In legal form, the decision in Ableman v. Booth was a vindication of federal judicial supremacy. In the actual historical context, however, federal judicial supremacy did not mean the supremacy of national policy over local or sectional policy. It meant precisely the reverse. It meant the denial to the federal government of any discretionary, policy-making function whatever in the matter of slavery. Questions regarding slavery were to be settled by the states that recognized the institution. And the federal judiciary — acting under the Constitution (which likewise recognized slavery) — was bound to give effect, extraterritorially, to the legal principles developed by the slaveholding states in connection with the peculiar kind of property that they alone possessed and that they alone, ac-

50. Ableman v. Booth, 21 Howard 506, at 520.

cordingly, were competent to legislate about. Even within the boundaries of the free states, legal procedure was to follow strictly the pattern set by and within the slaveholding states, regardless of any concepts of due process of law that the free community might deem fundamental. The principle of extraterritoriality could hardly take a form more extreme.

The controversy that reached its climax in the Booth case is conventionally interpreted as a conflict between federal supremacy on the one hand and state rights or state sovereignty on the other. Much is naturally made of the irony of the situation, the two factions to the slavery dispute having apparently switched their constitutional positions abruptly, in flagrant pursuit of immediate advantage.[51] A much more subtle analysis is necessary. It was not federal supremacy in general that the court upheld, but federal *judicial* supremacy. And federal judicial supremacy simply provided the means of enforcing the extraterritorial principles deduced from state sovereignty. In this particular conflict — to assert a paradox — the doctrine of state sovereignty was pitted against the doctrine of state rights, and the doctrine of state sovereignty won.

To make this distinction intelligible, I must digress briefly and ask the reader to examine with care the exact terminology of the American Constitution.

"Powers" and "Rights"

The written Constitution — with which, in the following discussion, the Bill of Rights is included — nowhere uses the words "sovereign" or "sovereignty."[52] Moreover, it knows nothing of

51. Thus Carl Schurz, an actual participant, later described the contest as one "in which the Republican party, the natural opponent of the States' rights doctrine . . . , planted itself upon extreme States' rights ground and went to the very verge of actual nullification, while the Democratic party, the traditional champion of the States' rights doctrine, became an ardent defender of the Federal power as against any pretensions of States' rights." But, he continued, "only two years later, when the bulk of the Slave States . . . had carried the States' rights doctrine to the logical length of secession," their opponents "rushed to arms to maintain the supreme authority of the Federal Government and to put down the pretensions of States' rights which were made in favor of slavery." "It was one of those struggles," he observed (quoting a remark of Lincoln's), "which . . . become so mixed that, in the heat of the wrestle, the combatants worked themselves into one another's coats." Schurz, *Reminiscences* (New York, 1907), II: 114-15.

52. The Articles of Confederation, agreed to by the Continental Con-

"rights" belonging either to the states or to the federal government. The foundation stone of the state-rights argument is the Tenth Amendment, but this amendment speaks not of the *rights* of the states but of their *powers:* "The powers not delegated to the United States, by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[53] The Constitution does, of course, speak frequently of "rights" — and occasionally of "privileges" or "immunities" — but in every instance the term refers to something possessed by an individual person, never something possessed, or capable of being possessed, by a government.[54] Frequently such an individual right is protected,

gress on Nov. 15, 1777, and finally ratified on March 1, 1781, did include the following provision: "Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." Art. II. Advocates of state sovereignty frequently argued that the Constitution of 1787 continued to embody the principle, though it conspicuously failed to include the clause.

53. The amendment is often flagrantly misquoted. At the Democratic Convention in Los Angeles in 1960, the southern minority submitted a dissenting report on the platform, insisting on "strict adherence to the constitutional guarantee that all powers not delegated by the states to the Union are reserved to the states or to the people." *New York Times*, July 13, 1960. Though the majority was said to "ignore the Tenth Amendment," the accusatorial minority deliberately ignored its provision referring to "powers . . . prohibited by it [the Constitution] to the States" — which is, of course, the crux of the matter. The constitutional situation, often misrepresented, is simply as follows: By the Fourteenth Amendment, the Constitution prohibits to every state the power to "deny to any person within its jurisdiction the equal protection of the laws." The Supreme Court has ruled that "separate educational facilities are inherently unequal." Brown v. Board of Education of Topeka, 347 U.S. 483 (May 17, 1954). Accordingly, any state action to enforce segregation in the public schools constitutes the use by the state of a prohibited power to "deny to any person . . . the equal protection of the laws." Thus the Tenth Amendment, by specifically recognizing that there are "powers . . . prohibited . . . to the States," raises no barrier to, but in fact gives support to, desegregation. In simplest terms, the question is not about powers delegated to the federal government but about powers prohibited to the states.

54. The body of the Constitution refers only once to a "right": it empowers Congress to secure "to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Art. I, sec. 8, clause 8. On the other hand, the word appears in six of the first ten amendments, thereby justifying the popular appellation, "Bill of Rights." The body of the Constitution speaks of "Privileges and Immunities of Citizens"; and it uses the term "privilege" in two other connections: members of Congress are "privileged from Arrest," and "the Privilege of the Writ of Habeas Corpus"

not positively by specifying the right, but negatively by denying to government some corresponding power.[55]

A clear-cut distinction pervades the entire written document. On the one hand, there are *powers,* which are exercised by government, which can be apportioned among the various branches and levels of government, and which can be denied to the federal government or to the states or to both. On the other hand are *rights,* which are enjoyed by citizens or persons, which can be set forth in positive terms, and which can also be defined negatively, by denying to one or another government a corresponding power. No usage inconsistent with this distinction is to be found anywhere in the written Constitution.[56] The distinction is recognized with absolute clarity in the companion clause to the Tenth Amendment, namely the Ninth, which reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." In summary, certain powers, but no rights, are delegated to the federal government. Certain other powers, but again no rights, are reserved to the states.[57] Other powers, ungranted to either type of government, remain in the

is safeguarded. See, respectively, Art. IV, sec. 2, and Art. I, secs. 6 and 9. The Bill of Rights does not use the word "privilege," but the phrase "privileges or immunities of citizens" reappears in the Fourteenth Amendment (1868). The word "power" is used throughout the Constitution — so frequently as to require no illustration.

55. One example will suffice to show the different modes by which a right is protected. The Seventh Amendment expressly *acknowledges* "the right of trial by jury," and the Sixth Amendment uses similar language. In the body of the Constitution, however, the same right is safeguarded by a positive *instruction*: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." Art. III, sec. 2. The Fifth Amendment uses a *prohibition* to protect a related right: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."

56. The Declaration of Independence is equally consistent, notably in its most memorable passage. All men, it says, "are endowed by their Creator with certain unalienable *Rights.*" Governments, on the other hand, derive "their just *powers* from the consent of the governed." (Italics added.) There is much less consistency in the terminology of the Articles of Confederation, which often couples "right and power," as in granting to the United States in Congress assembled "the sole and exclusive right and power of determining on peace and war. . . ." Art. IX.

57. As owners of property, of course, the states and the federal government do possess the ordinary rights associated with proprietorship. Moreover, they enjoy various immunities, both against one another (e.g., immunity from taxation) and against individual citizens (e.g., immunity

hands of the people, thus creating for them a body of unalienated rights. Among these are certain rights that are considered not merely unalienated but (in the language of the Declaration of Independence) unalienable. The latter are guaranteed in specific, positive terms by various clauses of the Constitution. Moreover, the enumeration of these particular rights may "not be construed to deny or disparage others retained by the people."

Given this consistent terminology, the phrase "state rights" is, strictly speaking, a constitutional solecism. As a term denoting a specific constitutional principle, indeed, it does not appear to have been used until 1798, in the debates over the alien and sedition acts.[58] On this, its first appearance, however, the phrase was not so much a solecism as a bit of convenient shorthand. The question at issue — freedom of the press — involved a "right" in the strictest constitutional sense. The *power* of the state was thus being invoked to protect a *right*. Accordingly it is not a serious misuse of language to telescope the terms and describe the Kentucky and Virginia Resolutions of 1798 as a defense of "state rights." Nor is the latter phrase inappropriate to describe state interposition against the fugitive-slave act in the 1850's.

State Sovereignty a Doctrine of Power

The doctrine of state rights, defined in this way, is a purely defensive doctrine. Arguments about sovereignty may be used to support it, but its spirit is essentially hostile to all the leading ideas associated with the concept of sovereignty — particularly with the concept of sovereignty as an indivisible and illimitable power, wielded by a definitive body, which must be the sole and final judge of its own authority. The latter conception, however, was central to the doctrine of state sovereignty. And its roots lay in a political tradition that the makers of the American Constitution had consciously rejected. In every form of government, Sir William Black-

from suit). These, however, are not the "rights" for which the state-rights argument contends.

58. "The powers of our general Government are checked by State rights." Samuel Smith (Md.), H.R., June 21, 1798. *Annals,* 5 Cong., 2 Sess., 2022. Mitford M. Mathews, ed., *A Dictionary of Americanisms on Historical Principles* (Chicago, 1951), 1642, records no earlier use of the phrase in a technical constitutional sense. As a rhetorical expression, of course, it crops up earlier.

stone had written on the eve of the American Revolution, "there is and must be . . . a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii,* or the rights of sovereignty, reside."[59] From such a postulate the British declaratory act of 1766 logically followed: that the King in Parliament "had, hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of *America,* subjects of the crown of *Great Britain,* in all cases whatsoever."[60]

The American Revolution involved a rejection not only of British sovereignty but also, in a profound and pervasive way, of the very concept of indivisible and uncontrollable sovereignty. The theory of divided sovereignty superseded it.[61] And the doctrine of state rights (as here defined) was perfectly compatible with the idea of divided sovereignty. By contrast, the doctrine of state sovereignty represented a return to the theory that sovereignty is, by its very nature, indivisible. Jefferson Davis, for example, dismissed the notion of divided sovereignty as "paradoxical." He insisted that "the only political community — the only independent corporate unit — through which the people can exercise their sovereignty, is the State." And he quoted with approval Burlamaqui's definition of sovereignty as "a right of commanding in the last resort in civil society."[62]

The doctrine of state sovereignty was not a doctrine of rights, but a doctrine of command and of power, imperious in its language, bristling with words like "supreme," "irresistible," "absolute," "uncontrolled," "paramount." Extraterritoriality, too, is an imperious principle, overriding local law and local custom and negating the idea of local self-government. These characteristics appeared in the conflict over fugitive slaves. The extraterritorial claims of the slaveholding states were to be enforced regardless of the views

59. Blackstone, *Commentaries on the Laws of England* (1765-1769), Introduction, sec. 2, p. 49.

60. 6 George III, chap. 12 (March 18, 1766). Accepted without question by Blackstone, Introduction, sec. 4, p. 109.

61. The acceptance by the Constitutional Convention of 1787 of the principle of divided sovereignty will be discussed in the book from which the present paper is drawn. Space does not permit a recapitulation here. For the concept itself, however, see the quotations from Taney, n. 48 above.

62. Jefferson Davis, *The Rise and Fall of the Confederate Government* (New York, 1881), I: 141-42.

of the community within which the law was to be executed. Because this particular extraterritorial claim was recognized by the federal Constitution, state sovereignty could be made effective through the use of federal power. On the surface, therefore, the legal vindication of the proslavery position appeared to be simply a victory for federal supremacy. The legal form of the fugitive-slave decision, however, should not be allowed to obscure the fundamental role played by the doctrine of state sovereignty and its extraterritorial corollaries.

The Question of Slavery in the Territories

The doctrine of state sovereignty played its most important role, however, in the conflict over slavery in the territories. In this conflict, moreover, it revealed itself even more clearly as a naked doctrine of power. Finally, the extraterritorial corollaries of state sovereignty constituted the indispensable foundation of the proslavery argument concerning the territories.

At this point a change of terminology becomes imperative, as the awkwardness of the last sentence indicates. The asserted right of a slaveowner to take his slaves into the territories and to hold and exploit them there is properly described as an extraterritorial right, for it was a right that was to be exercised and protected outside the territory of the state that created the right in the first place. Nevertheless, intolerable confusion results if one describes by the term *extra*territorial a right that was to be exercised *within* what was officially known as a "territory." To avoid this difficulty I propose, in the pages that follow, to employ as a synonym for "extraterritorial" a rather awkward neologism — namely, "extra-jurisdictional," meaning a right (or a power) exercised beyond the jurisdiction of the state in which it originated.[63]

Now the right to reclaim a fugitive slave was an extra-jurisdictional right explicitly recognized by the Constitution. But a right to carry slaves into the territories was nowhere mentioned in the written document. On the other hand, no power to prohibit the introduction of slaves was mentioned either. Every constitutional theory concerning the extension of slavery was thus a structure of pure inference — inference either from certain phrases of the written

63. Not to be confused, of course, with "extrajudicial," defined as "forming no part of the case before the court." *New English Dictionary on Historical Principles.*

Constitution, or inference from past precedents, or inference from some abstract theory about the Constitution. The latter sort of inference predominated in the discussions — as, for example, when the antislavery forces invoked a "higher law," moral in content, or when the proponents of "squatter" sovereignty invoked the principle of local self-determination, or when (to return to our immediate subject) the defenders of slavery invoked the doctrine of state sovereignty.

It is a curious fact that though the American Constitution was designed for an expanding nation, the western territories have always been anomalies in the scheme. It is conventional to say that the Constitution created a dual system, composed of the federal government and the states. In reality the Union has always comprised three elements, the federal government, the states, *and* the territories. Only in recent years have the latter declined to a place of relative insignificance in the constitutional structure. All but nineteen of the existing fifty states have passed through a formal territorial stage. Almost three quarters of the continental area of the United States has been, at one time or another, under a territorial government established by federal statute.[64]

The anomalous position of the territories in the constitutional scheme is simply this: Within the parts of the Union fully organized into states, the Constitution recognizes the existence of two governments, state and federal, operating simultaneously but independently and acting directly upon individuals. To each government a sphere of authority is constitutionally assigned. International and interstate relations are the supposed province of federal action. Ques-

64. The exceptions were: the thirteen original states; two states that were almost immediately admitted (Vermont in 1791 and Kentucky in 1792); and four others for which the circumstances were exceptional: Maine (admitted in 1820 by consent of Massachusetts, of which it had been a part), Texas (annexed as a full-fledged state in 1845), California (admitted in 1850 under a state constitution that had been adopted before territorial government was extended over the Mexican cession), and West Virginia (which seceded from Virginia and was admitted in 1863). The present boundaries of these nineteen states include a gross area of 856,122 square miles, compared with 3,022,387 for continental United States as a whole (excluding Alaska). U.S. Bureau of the Census, *Statistical Abstract: 1955* (76th ed., Washington, 1955), 9 (Table 4). Maps showing the boundaries of the territories at all periods are in Charles O. Paullin and John K. Wright, *Atlas of the Historical Geography of the United States* (Washington, 1932), Plates 61-67.

tions of domestic social policy — involving the exercise of "police powers," so-called — belong clearly to the sphere of action reserved to the states. In the territories, however, no state government, in a constitutional sense, exists. By whose authority, then, are local police powers to be exercised?

Before examining the possible answers, it will be well to take careful note of the practical importance of the question — one that seems, at first glance, to belong to the realm of metaphysical speculation. Under ordinary circumstances, a precise answer was clearly unnecessary. A territory was simply an area in transition from unsettled wilderness to complete statehood. Whatever government existed *de facto* within a territory was bound to wield a police power for the time being, simply because it was charged with maintaining order. A rough and ready practicality, untroubled by elaborate theories about political structure, sufficed for carrying on the everyday affairs of a territory and handling (or postponing) its relatively simple problems. Territorial status was a temporary one. In the end, statehood would operate as an act of oblivion, curing or obliterating any theoretical irregularities that might have belonged to the territorial period.

This was true in most circumstances, but not in all. Slavery created problems of precisely the kind to convert these abstract and apparently trivial questions of constitutional theory into practical and momentous issues of constitutional law. The police power was, among other things, the power to deal with slavery. It was through their police powers that the slaveholding states enacted slave codes, it was through theirs that the free states abolished slavery. Whether or not slavery expanded into the territories thus depended upon how (and by whom) the police power was exercised there.

In the nature of the case, moreover, a decision on slavery during the territorial period would have permanent, not temporary, effects. If the police power were employed at the outset to protect the property rights of slaveholders, then slavery was likely to become so entwined with the institutions of the locality as to be in practice ineradicable. On the other hand, if the police power were used in such a way as to discourage the bringing in of slaves, then the territory would almost certainly produce a free-state majority when the time came to write a permanent constitution and seek admission to the Union.

Both parties to the controversy understood perfectly these implications. Lincoln, in a speech at Peoria on October 16, 1854, presented the antislavery argument against vesting the power of decision in the first settlers:

> Another important objection to this application of the right of self-government, is that it enables the first FEW, to deprive the succeeding MANY, of a free exercise of the right of self-government. The first few may get slavery IN, and the subsequent many cannot easily get it OUT. How common is the remark now in the slave States — "If we were only clear of our slaves, how much better it would be for us." They are actually deprived of the privilege of governing themselves as they would, by the action of a very few, in the beginning.[65]

Proslavery spokesmen were equally opposed to allowing the settlers to decide. James S. Green of Missouri stated the reasons in a speech to the Senate in 1860. Unless slave property is protected in the territories from the beginning, he argued,

> nobody will go there except those who do not own slaves; and when they come to the determination of the question, there will not be an interest sufficient to justify the adoption of the law of holding slaves. The consequence, the inevitable consequence, will be — not another slave State, no expansion of the South, no outlet to the South; but cramped and confined within her present limits, she may prosper for a while, but she will ultimately languish for the want of the power of expansion.[66]

To opponents and defenders of slavery alike, it seemed clear that the first decisions made in the territories would be the determining ones. However significant in theory might be the sovereignty of the state when eventually admitted to the Union, in practice this power — plenary but deferred — might well prove meaningless so far as slavery was concerned. Long before a state attained full standing, its social system could have been irrevocably fixed by decisions already made. Control of the police power during the territorial stage was thus the crux of the entire issue.

The Wilmot Proviso

It was the Wilmot Proviso of 1846 that brought this issue to the forefront of American politics and thus began the fifteen-year

65. *Collected Works,* II: 268.
66. Jan. 11, 1860. *Globe,* 36 Cong., 1 Sess., App., 77. In a speech

crisis that finally swept the nation into civil war. Under debate was an amendment to a two-million-dollar appropriation bill requested by President James K. Polk, for the purpose, as he said, of paying "for any concessions which may be made by Mexico" in a future peace treaty. The principal object, the President hardly needed to explain, was "the adjustment of a boundary between the two republics" — in plain language, territorial cessions by Mexico to the United States.[67] During debate in the House of Representatives, in the evening of August 8, 1846, David Wilmot of Pennsylvania moved the following amendment:

> *Provided,* That, as an express and fundamental condition to the acquisition of any territory from the Republic of Mexico by the United States, by virtue of any treaty which may be negotiated between them, and to the use by the Executive of the moneys herein appropriated, neither slavery nor involuntary servitude shall ever exist in any part of said territory, except for crime, whereof the party shall first be duly convicted.[68]

The House adopted the proviso almost immediately, by a vote of 83 to 64.[69] The Senate refused to accept it, then or later.[70] But the fat was in the fire.

to the Mississippi legislature on Nov. 16, 1858, Jefferson Davis likewise emphatically denied the right "of the first in the race of migration who reach a territory . . . to enact laws for the exclusion of other joint owners of the territory, who may . . . choose to take with them property recognized by the Constitution, but not acceptable to the first emigrants." Dunbar Rowland, ed., *Jefferson Davis, Constitutionalist: His Letters, Papers and Speeches* (Jackson, Miss., 1923), III: 345. Writing long after the Civil War, Davis reiterated his objection to the doctrine of popular sovereignty, as involving "a power in the Territorial Legislatures permanently to determine the fundamental, social, and political institutions of the Territory, and thereby virtually to prescribe those of the future State." *Rise and Fall of the Confederate Government,* I: 40.

67. Message of the President, Aug. 8, 1846. *Globe,* 29 Cong., 1 Sess., 1211.

68. *Globe,* 29 Cong., 1 Sess., 1217.

69. This vote was in committee of the whole. *Ibid.* In the House itself, the bill (with the Wilmot Proviso included) passed by a vote of 87 to 64. *Ibid.,* 1218 (Aug. 8, 1846).

70. Congress adjourned two days later (Aug. 10, 1846) with the Senate bogged down in debate on the measure. *Ibid.,* 1220-21. At the next session a new bill (increasing the appropriation to three million dollars) was introduced. The House of Representatives, in committee of the whole, amended the measure on Feb. 15, 1847, to include an even more sweeping version of the proviso: "*Provided, further,* That there shall be neither

What made the Wilmot Proviso controversial? The answer requires a careful discrimination among constitutional principles. The proviso was in complete accord with the *law* of the Constitution, as understood up to that time. In banning slavery, the proviso used language almost identical with that of the Northwest Ordinance of July 13, 1787, adopted by the Continental Congress while the Constitutional Convention of 1787 was still sitting.[71] After the adoption of the Constitution, Congress immediately re-enacted the ordinance[72] and thereafter included the same prohibition, in virtually the same language, in a series of five territorial acts, from 1800 to 1838,[73] and in the Missouri Compromise of 1820.[74] The

slavery nor involuntary servitude in any territory on the continent of America which shall hereafter be acquired by or annexed to the United States by virtue of this appropriation, or in any other manner whatever, except for crimes whereof the party shall have been duly convicted. . . ." The proviso was moved by Hannibal Hamlin of Maine (later Vice-President under Lincoln) and adopted, in committee of the whole, by a vote of 110 to 89. When the committee rose, the House of Representatives itself adopted the Wilmot Proviso (as it continued to be called, regardless of its actual mover) by a vote of 115 to 106, and then passed the bill, 115 to 105. *Globe,* 29 Cong., 2 Sess., 424-25 (Feb. 15, 1847). The Senate rejected the Wilmot Proviso on March 1, 1847, by a vote of 21 to 31. *Ibid.,* 555.

The Senate bill, without the proviso, came before the House of Representatives on the last day of the session, March 3, 1847. An attempt to reinsert the Wilmot Proviso was finally defeated, 97 to 102, and the bill without it then passed the House, 115 to 81. *Ibid.,* 573.

71. "There shall be neither Slavery nor involuntary Servitude in the said territory otherwise than in the punishment of crimes, whereof the Party shall have been duly convicted. . . ." In "An Ordinance for the government of the territory of the United States North west of the river Ohio," July 13, 1787, Articles of Compact, Art. 6. *Territorial Papers,* II: 49.

72. Act of Aug. 7, 1789, chap. 8. *Stat. at L.,* I: 50. Also printed, from the original MS, in *Territorial Papers,* II: 203-4.

73. Acts creating governments for the territories of Indiana (1800), Michigan (1805), Illinois (1809), Wisconsin (1836), and Iowa (1838). These are listed, with citations, in the dissenting opinion of Justice Benjamin R. Curtis in the Dred Scott case, 19 Howard 393, at 618 (March 6, 1857). An analysis of the entire series of territorial acts is provided in Max Farrand, *The Legislation of Congress for the Government of the Organized Territories . . . , 1789-1895* (Newark, N.J., 1896). Texts of the basic acts are reprinted in Francis N. Thorpe, ed., *The Federal and State Constitutions . . . of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* (Washington, 1909), 7 vols.; hereafter cited as Thorpe, ed., *Constitutions.*

74. Act of March 6, 1820, chap. 22, sec. 8. *Stat. at L.,* III: 545, at 548. Reprinted in Thorpe, ed., *Constitutions,* IV: 2148.

power to act on the matter had not, prior to 1846, been seriously challenged.[75]

The principle that the Wilmot Proviso thrust aside was not a *law* of the Constitution, but a *custom* of the Constitution, which dated back to the First Congress. On December 22, 1789, North Carolina ceded its western lands to the Union, to be governed according to the principles of the already re-enacted Northwest Ordinance, "*Provided always* that no regulations made or to be made by Congress shall tend to emancipate Slaves."[76] Congress accepted the condition and set up a Southwest Territory (later the state of Tennessee), explicitly providing that the antislavery section of the earlier ordinance should not apply.[77] Thereafter, from 1798 to 1822, Congress organized various southern territories in like manner, such acts roughly balancing in number those in which it prohibited slavery.[78] Moreover, the Missouri Compromise of 1820 established the parallel of 36° 30′ north latitude as a dividing line through the territories that had been acquired by the Louisiana Purchase and that remained in territorial status after the admission of Missouri to statehood. North of this line slavery was prohibited;

75. An exhaustive and invaluable treatise on the legal aspects of the territorial system is provided by Francis S. Philbrick in the 477-page introduction to his edition of *The Laws of Illinois Territory, 1809-1818 (Collections of the Illinois State Historical Library,* XXV, Springfield, 1950), hereafter cited simply as Philbrick. On the question of power to legislate for the territories, see especially pp. xcviii-clvii.

76. North Carolina, act of cession, Dec. 22, 1789, sec. 4. *Territorial Papers,* IV (Washington, 1936): 7. Repeated verbatim in the deed of cession, Feb. 25, 1790, and in the act of Congress accepting it, April 2, 1790. *Ibid.,* 12, 16.

77. "An Act for the government of the territory . . . south of the river Ohio," May 26, 1790, chap. 14. *Stat. at L.,* I: 123. *Territorial Papers,* IV: 18-19.

78. In the list that Justice Curtis included in his dissent to the Dred Scott decision, 19 Howard 393, at 618, five territorial acts of this character from 1798 to 1822 were cited. These neatly balance the five territorial acts from 1800 to 1838 in which slavery was prohibited. Such a balance, however, is somewhat artificial, for many acts permitted slavery simply by remaining silent. More significant is the fact that seven states had emerged from the territorial stage before the end of 1846 with slavery as an established institution, namely: Tennessee (admitted 1796), Louisiana (1812), Mississippi (1817), Alabama (1819), Missouri (1821), Arkansas (1836), and Florida (1845); whereas five had emerged as free states, namely: Ohio (1803), Indiana (1816), Illinois (1818), Michigan (1837), and Iowa (1846); and another was in close prospect: Wisconsin (admitted 1848).

south of it there was no restriction.[79] The established *custom* of the Constitution, before 1846, was thus to apportion the territories in an equitable fashion, so as to permit slaveholding in the southerly portions and prohibit it in the northerly.

The conservative position on the Constitution, throughout the entire crisis, was that the *law* and the *custom* of the Constitution (as here defined) were equally binding — in other words, that Congress had an indubitable *power* to prohibit or permit slavery in the territories, but that it had a corresponding *obligation* to consider the interests of the slaveholding states in legislating for the southern territories and the wishes of the free states in legislating for the northern.[80] In immediate reaction to the Wilmot Proviso, this position was asserted in several substitute amendments that would have extended the Missouri Compromise line across all territories subsequently acquired. Each of these proposals was promptly voted down in the House of Representatives.[81] It was this rejection of the

79. See n. 74 above.

80. One of the ablest statements of the conservative position is a little-known book by Sidney George Fisher, published anonymously in November, 1859, *The Law of the Territories* (Philadelphia, 1859); see especially pp. 78-83. The conservative position (as here defined) was the one taken by Justice Curtis in his dissent in the Dred Scott case, wherein he rejected three alternative constitutional views that had been presented at the bar of the court. These he succinctly summarized as follows: "One is, that though Congress can make a regulation prohibiting slavery in a Territory, they cannot make a regulation allowing it; another is, that it can neither be established nor prohibited by Congress, but that the people of a Territory, when organized by Congress, can establish or prohibit slavery; while the third is, that the Constitution itself secures to every citizen who holds slaves, under the laws of any State, the indefeasible right to carry them into any Territory, and there hold them as property." 19 Howard 393, at 620. Obviously these were the positions, respectively, of the Republicans, of the "territorial sovereignty" Democrats under Douglas, and of the extreme southern Democrats (whose senatorial spokesman was Jefferson Davis). The fourth position (that is, the conservative one, which Curtis by implication accepted) was presumably the position of the Constitutional Union Party in 1860, though its platform and the speeches of its candidates were frustratingly vague. It was clearly the position of Senator John J. Crittenden of Kentucky, whose famous compromise resolutions, proposed in the Senate on Dec. 18, 1860, represented essentially a return to the constitutional understandings of the period prior to 1846, which he sought to put beyond question by embodying them in formal constitutional amendments. The crucial first article would have restored the Missouri Compromise line for all territory "now held, or hereafter acquired." *Globe,* 36 Cong., 2 Sess., 114.

81. Immediately after the introduction of the Wilmot Proviso, on Aug.

traditional approach to the problem that led to an intensive re-examination of constitutional precedents and postulates by all concerned, and hence produced the great constitutional crisis of 1846-1860.

The Constitutional Status of Territories

The precedents went back to a period before there was a formal constitution. Indeed, a conflict over the western territories blocked, for almost four years, the ratification of the first written instrument of federal government, the Articles of Confederation, drafted in 1777. Certain states claimed sovereignty over extensive areas in the West; certain others possessed no such claims. The latter insisted that these great unsettled areas become the property of the Union, rather than of particular states, and be developed for the common benefit. The log jam was broken in 1780, when various states (commencing with New York) began to cede their western claims, and Congress adopted a resolution promising that these lands would "be settled and formed into distinct republican states, which shall become members of the federal union, and have the same rights of sovereignty, freedom and independence, as the other states."[82] The smaller states were satisfied. On March 1, 1781, the last state gave its assent to the Articles of Confederation, and the United States began to live under its first written federal constitution.

The obvious — indeed, the necessary — assumption was that Congress would provide governments for the new territories. In doing so, it was morally bound to accord to actual settlers some degree of participation in territorial government and to advance them as rapidly as possible toward the fully self-governing stage that statehood would represent. Throughout the 1780's there were sharp

8, 1846, an amendment to substitute the Missouri Compromise line was voted down by the House of Representatives, sitting as committee of the whole, 54 to 89. *Globe,* 29 Cong., 1 Sess., 1217. When the proviso came up again, on Feb. 15, 1847, three distinct amendments to like effect (one of them offered by Stephen A. Douglas) were similarly voted down by the House, again in committee of the whole. The votes were 82 to 109 and 81 to 104; the third amendment was rejected without a division. *Globe,* 29 Cong., 2 Sess., 424-25.

82. Resolution of Oct. 10, 1780. *Journals of the Continental Congress, 1774-1789* (Washington, 1904-1937), XVIII: 915.

conflicts of opinion about the proper balance to be struck between federal authority and local autonomy in the territories. But there was not the slightest hint that the individual states should play a separate and independent role — apart from the constituted organs of the Union — in governing the territories they had already ceded, thereby surrendering (in the words of the Virginia deed of cession) "all right, title and claim as well of soil as of jurisdiction."[83]

The real territorial question of the early republic was the degree of local self-government to be granted the inhabitants of a territory. On one side was Thomas Jefferson, who drafted the first land ordinance in 1784, and who proposed to give the settlers, from the very beginning, almost complete control over their own affairs. On the other side were the more conservative groups who shaped the Northwest Ordinance of 1787. This enactment specified a virtually colonial type of government, by federally appointed authorities, during the first stage of territorial existence; during the second stage it permitted the inhabitants some direct participation in territorial government; but it withheld full powers of self-government until the time for statehood arrived. The latter pattern prevailed, for the Ordinance of 1787 superseded the Ordinance of 1784 and became the prototype of all later territorial acts.[84]

Divergent as were these two philosophies of territorial government, they reached an identical conclusion so far as slavery was concerned. Jefferson's original draft of 1784 included a prohibition of slavery in *all* the western territories.[85] The Ordinance of 1787 applied a similar prohibition to the particular area with which it dealt,

83. March 1, 1784. *Territorial Papers,* II: 9. The New York cession, March 1, 1781, used the words: "All the Right, Title, Interest, Jurisdiction and Claim." *Ibid.,* 5.

84. See the elaborate comparison of the two plans of territorial government by Philbrick, ccl-ccclxxxvi.

85. "That after the year 1800 of the Christian aera, there shall be neither slavery nor involuntary servitude in any of the said states, otherwise than in punishment of crimes, whereof the party shall have been duly convicted to have been personally guilty." Report to Congress of the committee to prepare a plan for the temporary government of the western territory, March 1, 1784 (original in Jefferson's handwriting). Julian P. Boyd, ed., *The Papers of Thomas Jefferson,* VI (Princeton, N.J., 1952): 604. The clause appeared in the revised report, March 22, 1784 (also in Jefferson's hand). *Ibid.,* 608. As discussed in n. 87 below, it was rejected by Congress and does not appear in the ordinance as enacted on April 23, 1784. *Ibid.,* 613-15.

"the territory of the United States North west of the river Ohio."[86] Jefferson's prohibitory clause was eliminated from the Ordinance of 1784 before enactment by Congress,[87] but its subsequent inclusion in the Ordinance of 1787 showed that the dropping of the provision did not imply a lack of power to adopt it.

There was, it is true, a subtly different philosophical basis for the two abolitionary clauses. In the Northwest Ordinance, Congress was simply legislating for the territories. This legislative power might, without question, be exercised in an opposite way, to permit slavery, and it was so exercised in 1790 when Congress created the Southwest Territory.[88] In the Jeffersonian scheme, on the other hand, the prohibition of slavery did not represent an exercise of federal legislative power, for Jefferson assigned virtually all legislative power to the inhabitants of the territories themselves. Instead, the prohibition of slavery in the territories was, in Jefferson's mind, simply a vindication of the principle of natural and unalienable rights.[89] Slavery denied the fundamental right to liberty. To eliminate this violation of natural rights in the older states would require time, but there was no reason why slavery should not be banned

86. See n. 71 above.

87. The matter came to a vote on April 19, 1784. The motion was put in such a way than an affirmative majority was needed to retain Jefferson's prohibition of slavery. The motion was to strike out the section, but the question was put as follows: "Shall the words moved to be struck out stand?" Six states voted in the affirmative, against only three in the negative, but the rules of Congress required an affirmative vote of seven states, and the provision was lost. Actually the seven states from Pennsylvania northward were unanimously in favor, fourteen of their delegates in all voting aye. One of these states (New Jersey), however, was represented by only a single delegate, insufficient for a quorum; hence the state could not be counted. Among the southern states, only two (Maryland and South Carolina) were unanimously against the provision. In North Carolina the delegation was evenly divided; hence the vote of the state could not affect the decision. Within the Virginia delegation, too, there was division, and, by a bitter irony, Jefferson's affirmative vote was overridden by the negative votes of his two colleagues. Delaware and Georgia were absent. Altogether, only seven individual delegates were opposed to the provision, against sixteen in favor, two of the latter from southern states. *Journals of the Continental Congress,* XXVI: 247. Few issues so momentous have ever been decided by so unsatisfactory a ballot.

88. See n. 77 above.

89. Cf. the exclamations in his *Notes on Virginia,* written at this very time: "With what execrations should the statesman be loaded, who [permits] one half the citizens thus to trample on the rights of the other. . . . And can the liberties of a nation be thought secure when we have removed

from the beginning in new territories that were to grow up "in republican forms."[90] The prohibition of slavery was to be part of what Jefferson labeled a "Charter of Compact" — in effect a primordial bill of rights, and, as such, "fundamental" and "unalterable."[91] Whether the abolition of slavery be regarded as a legislative measure or as a constitutional protection of fundamental rights, the fact was that by 1787 it had entered clearly into the system of law being evolved for the territories.

In terms of the American concept of constitutional law — which grants priority to the language of the written Constitution over any mere tradition of constitutional action — the basic question was whether the Constitution of 1787 validated the measures that had already been taken respecting the territories. If not — and especially if the Constitution could be construed as forbidding these measures — then the policy (no matter of how long standing) could be reversed on constitutional grounds. This was precisely the result at which the defenders of slavery aimed in the constitutional doctrine they developed after 1846. They built up, from state-sovereignty premises, a theory of the Constitution that denied the legality of every measure prohibiting slavery in the territories that had ever been enacted from the time the Union was perfected in 1787-1788.

They were aided in doing so by the undeniable vagueness and

their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God?" The way, he hoped, was "preparing, under the auspices of heaven, for a total emancipation." Jefferson, *Notes on the State of Virginia* (William Peden, ed., Chapel Hill, N.C., 1955), 162-63. He still hoped that Virginia would pass legislation he had earlier favored, which would "emancipate all slaves born after passing the act." *Ibid.*, 137; see also Boyd, ed., *Jefferson Papers,* II: 472n.

90. Phrases promising "a Republican Form of Government" echoed through all the documents of the founding period. See, for example, the resolution of Congress of Oct. 10, 1780, on the cession of western lands (cited in n. 82 above); Jefferson's draft ordinance of 1784 (from which the phrase in the text is quoted); and the Constitution itself, Art. IV, sec. 4. Such guarantees furnished one basis for the view that the federal government should exercise a general superintendence over the institutions that might develop in the territories — including the institution of slavery. Thus Timothy Fuller of Massachusetts declared in the House of Representatives on Feb. 15, 1819, that "the existence of slavery in any State is so far a departure from republican principles." *Annals,* 15 Cong., 2 Sess., 1180.

91. Boyd, ed., *Jefferson Papers,* VI: 605. On the essential unreality of the supposed "compact," see Philbrick, clxxix, *et seq.*

ambiguity of the single clause of the written Constitution that dealt with territorial matters:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . .[92]

Though legislative power can be described as the power to make rules and regulations,[93] nevertheless the language of this clause was obviously weaker than that employed in giving Congress the power "to exercise exclusive Legislation in all Cases whatsoever" over the District of Columbia and over such federal sites as forts and dockyards.[94] Moreover, by referring to "Territory or *other Property,*" and by emphasizing the power "to *dispose of*" both, the clause might be interpreted as referring to real-estate transactions rather than to territorial government.

By making the most of these ambiguities, proslavery theorists could argue either that this particular clause did not apply to the situation at all or that it delegated to Congress such limited authority over the territories that no legislative interference with slavery was permissible there. A different kind of power — a non-legislative power, deriving from a different constitutional source — could then be assigned to Congress. And this power, being a creation of pure constitutional theorizing, could be so defined that it would be capable of protecting slavery in the territories without, at the same time, subjecting it to the hazard of hostile legislation.

If full legislative power over the territories had not been vested in Congress by the Constitution, then surely the power must belong to the inhabitants themselves. This had been the Jeffersonian alternative. And it was the alternative that Stephen A. Douglas supported with vigor and consistency under the name of territorial or popular sovereignty. To most supporters of slavery it seemed, for a decade after 1846, the best defense against the hated Wilmot Proviso. But as events in Kansas gradually pointed, in the later 1850's, toward an ultimate free-state victory there, proslavery forces

92. Constitution, Art. IV, sec. 3, clause 2.

93. Certain of the most important powers of Congress were delegated to it in this language, including the power "to regulate Commerce." Constitution, Art. I, sec. 8, clause 3; see also clauses 4, 5, 11, 14. Philbrick discusses the question at length, cv-cxxx.

94. Art. I, sec. 8, clause 17.

turned venomously upon the author of the Kansas-Nebraska Bill and repudiated his doctrine and all his works. The theory of state sovereignty came to full fruition in the brief period that followed. And it showed its imperious quality by the peremptory way in which its supporters rejected every vestige of the idea that the people of a territory were sovereign or self-governing. Typical was a speech in the House of Representatives in 1859 by Otho R. Singleton of Mississippi:

> Sovereignty, as I understand it, and as it is defined by lexicographers, is the highest power — the supreme power in a State; and, if this definition be correct, (and I apprehend nobody will controvert it,) when Mr. Douglas and his followers undertake to put the Territorial Legislature upon the same footing with a State Legislature, in my judgment they are guilty of a most egregious blunder. Now, let me ask what sovereignty is there — call it squatter sovereignty, popular sovereignty, or whatever else you please — belonging to the people of a Territory? Can they organize a territorial government for themselves? . . . . Can they elect their own officers without the special permission of the Congress of the United States? Every act that is passed by the Territorial Legislature is subject to the revision of Congress, and liable to be annulled by that body, and there is not a single act a Territorial Legislature can perform showing it to be sovereign.
>
> But the gentlemen claim that the Legislature of a Territory has the same powers as the Legislature of a State. Why, sir, never was a more erroneous proposition asserted. A State Legislature may perform a thousand acts of sovereignty, its power being controlled by no superior. . . . The people of a State select their own officers, establish their own judicial tribunals, alter or abolish their State government at will. And when gentlemen undertake to put a State and Territory upon the same footing in respect to sovereignty, they involve themselves in difficulties which they cannot meet successfully.[95]

The doctrine of state sovereignty was as hostile to local self-determination in the territories as to the exercise of federal legislative power there. But what other alternative could there be? It was in answering this question that the theorists of state sovereignty revealed their extraordinary ingenuity. And the foundation of their argument was the extra-jurisdictional (or extraterritorial) principle that has already shown itself to be the most significant corollary of state sovereignty.

95. Dec. 19, 1859. *Globe*, 36 Cong., 1 Sess., App., 52.

In legal terms, as we have seen, the question at issue was the source of the police power in the territories — the power that might determine, among other things, the existence or nonexistence of slavery. The state-sovereignty argument began by pointing out that the exercise of a police power is the prerogative of a sovereign. The people of a territory had not attained sovereignty, and the federal government had not received, by delegation, those attributes of sovereignty that would enable it to wield a power of local police. The idea that the federal government might exercise such powers in the territories — by default as it were — was rejected as untenable. The federal government is a government of delegated powers, and local police powers are precisely the ones not delegated to it, but "reserved" by the Tenth Amendment. And they are reserved to the full-fledged sovereign states of the Union, and to them alone.

One finds it hard to imagine how the several states could exercise any power of police in territories beyond their boundaries and outside their jurisdictions. And if they attempted to do so, each projecting its sovereignty into the same area, what possible result could there be but conflict, commotion, and chaos? The answer of state-sovereignty theorists was to assign to the federal government a peculiar, extraconstitutional role in the territories. It was to act there not as the government of the *United* States, but as the agent of the united *States*.

This ingenious dualism solved, with the elegance of Euclid, the constitutional problem that confronted the defenders of slavery. In traditional federal matters, the government of the United States was a *government,* with a legislature capable of determining federal policy, an executive capable of enforcing it, and a judiciary sworn to uphold federal statutes as part of the supreme law of the land. In territorial matters, on the other hand, the federal government was not to be deemed a government at all, but a *trustee*. It was a trustee for the sovereign states, responsible to them severally, charged with giving extraterritorial effect to their laws, and denied any deliberative or discretionary power of its own. It had duties to perform and it possessed the power to perform them. But the power to act did not imply the power to decide. The proslavery constitutional theory succeeded in preserving a centralized authority powerful enough to enforce the rights of slaveowners outside the jurisdictions of the slaveholding states. At the same time, it denied

to this central authority any power to make policy with respect to slavery in any place or in any manner.

The Real Significance of State Sovereignty

It is time to examine the various — and extraordinary — features of this fully developed doctrine of state sovereignty. The first point to be noted is that the theory did *not* propose a lessening of federal authority in the territories. Federal powers were to be kept in being — even enhanced — in order to protect the exposed flank of slavery. But these powers were so defined as to be capable of employment in only one way. President Franklin Pierce stated the ultimate and desired conclusion in a message to Congress in 1855. "The General Government," he said, "was forbidden to touch this matter [slavery] in the sense of attack or offense" but was obliged to act upon it "in the sense of defense against either invasion or domestic violence."[96] Senator John M. Berrien of Georgia was even more explicit. "Congress," he asserted, "may legislate upon this subject in the Territories, *affirmatively*," that is to say, "to facilitate the exercise of a constitutional right" to own slaves, but it had no power to legislate in such a way as "to create obstructions to the enjoyment" of this right.[97] Speaking for the Supreme Court, Chief Justice Roger B. Taney reiterated the view: "The Government of the United States had no right to interfere for any other purpose but that of protecting the rights of the owner."[98]

These conclusions — which found expression in all three branches of the federal government — were the product of several subtle but exceedingly important transformations in the realm of constitutional theory.

In the first place, the traditional criterion of constitutionality had

96. Third annual message, Dec. 31, 1855. James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents* (Washington, 1897), V: 343.

97. Quoted by Thomas Hardeman, Jr. (Ga.), H.R., April 12, 1860. *Globe*, 36 Cong., 1 Sess., App., 223. Hardeman himself went on to offer a new and revealing distinction, quite different from the orthodox distinction between powers granted to the federal government and powers reserved to the states. Instead, Hardeman spoke of "the distinction between their [i.e., Congress's] powers of protection — for it was for that our Government was created — and those negative powers which belong not to Congress." *Ibid.*

98. Dred Scott v. Sandford, 19 Howard 393, at 426 (March 6, 1857).

been replaced by another. The federal government being a government of delegated powers, the accepted test applied to any federal measure had always been whether or not the power employed was delegated by the Constitution to the federal government. In place of this, a new criterion of constitutionality was insisted upon — a criterion of *purpose*. If a power were used in such a way as to weaken slavery, then it was without constitutional justification, regardless of whether the power, considered as such, lay within the scope of delegated powers. In a speech to the Senate in 1856, Clement C. Clay, Jr., of Alabama, brusquely swept aside as irrelevant, so far as slavery was concerned, the distinction between action that intruded upon the reserved powers of the states and action that fell within the recognized sphere of federal competence. Outright abolitionism, he said, was "less odious and dangerous" than the policy of "those who concede that slavery in the States is beyond the reach of Congress under the Constitution . . . but yet avow their intention and their power to assail it in the Territories, this District [of Columbia], and wherever the national flag floats." Their ultimate goal, he argued, was to "overthrow slavery in the States." The goal itself was unconstitutional, regardless of the means employed. The fact that opponents of slavery approached this goal by a "circuitous" path rendered their conduct not scrupulously constitutional but "insidious and dastardly." "An army with banners," Clement Clay exclaimed, "is preferable to a Trojan horse."[99]

This theory rendered unconstitutional any use of federal power anywhere or at any time in a fashion inimical to slavery. Nevertheless, the theory was still a negative one. Something more was needed: a mandate from the Constitution itself requiring the positive use of federal power to safeguard slavery in the territories. The second great transformation of constitutional theory looked to this particular end. Proslavery theorists undertook to discover in the Constitution itself such a clear guarantee of the rights of slaveowners that Congress and the President would be obliged, whatever their inclinations, to protect the institution of slavery in the territories, without acquiring thereby any concomitant power to debate or decide questions of policy relating to it.

The starting point of this theory was the fact that the Constitu-

99. April 21, 1856. *Globe*, 34 Cong., 1 Sess., App., 487-88.

tion did recognize the existence of slavery. Furthermore, it gave extraterritorial effect to the laws of the slaveholding states in the matter of fugitive slaves. Antislavery leaders, of course, conceded all this, but they considered slavery a tolerated evil, and they regarded the specific provisions of the Constitution as setting the uttermost limits of such toleration. Beyond these limits, they insisted, every constitutional power of the federal government might legitimately be directed against slavery, to limit, weaken, and eventually destroy it. The question of whether federal power should be used in this way was a question of policy, not of constitutional law — a question to be decided by the recognized deliberative organs of the federal government.

Proslavery constitutionalists took a diametrically opposite view. The clauses of the Constitution that recognized slavery were to be construed not narrowly but broadly — not as limits on the protection that slavery might enjoy but as tokens of the full protection that the Constitution implicitly promised. By recognizing slavery, moreover, the Constitution necessarily recognized the laws of the slaveholding states and made their principles the controlling ones in every question that affected slavery. No power to legislate about slavery had, after all, been delegated to Congress. But slavery was an institution that must be defined and provided for by law. There was only one place where such law could be found or could be made — in the sovereign states that upheld and protected slavery. Whenever an issue involving slavery arose in the domain of federal responsibility, therefore, the laws of the slaveholding states must take on extra-jurisdictional force, filling the void created by the constitutional incapacity of Congress to legislate on the subject. On all matters affecting slavery, in other words, the slaveholding states, as sovereigns, were to make policy not for themselves alone, but for the country as a whole, except within the boundaries of such sovereign states as had chosen to abolish the institution.[100]

100. Even there, of course, the laws of the slaveholding states were to operate extraterritorially upon fugitive slaves. Extraterritoriality, one should observe, was to work in one direction only. The freedom that a slave might have gained by being taken into a free state vanished if he was taken back into a slave state. In his concurring opinion in the Dred Scott case, Justice Nelson emphatically rejected the argument "that as Dred Scott was free while residing in the State of Illinois, by the laws of that State, on his return to the State of Missouri he carried with him the personal qualities of freedom, and that the same effect must be given to his status there

Senator Berrien of Georgia stated the matter succinctly: "Slavery exists in the State where the owner dwells; it exists out of the State where the owner dwells. Once existing, it exists everywhere, until it comes within limits of a sovereignty which inhibits it."[101] The theory of state sovereignty, in other words, made slavery a national institution. Senator James S. Green of Missouri used this very term when he asserted "that the prohibition of slavery in the United States is local, and that the right to hold slave property wherever there is no prohibition is national."[102]

The doctrine of state sovereignty, in the last analysis, was a nationalistic doctrine, not a localistic one. Despite appearances, its real tendency was toward consolidation not decentralization. By exalting sovereignty, it destroyed the philosophical foundation for a genuinely pluralistic society, in which diversity would be cherished. There was one peculiarity: indivisible sovereignty was ascribed to the several states rather than to the nation. As a consequence, the doctrine exhibited to the world two seemingly contradictory faces. Within their borders, the slaveholding states were invoking a sov-

as in the former State." On the contrary, he said, "No State . . . can enact laws to operate beyond its own dominions. . . . Such laws can have no inherent authority extra-territorially. . . . Now, it follows from these principles, that whatever force or effect the laws of one State or nation may have in the territories of another, must depend solely upon the laws and municipal regulations of the latter." Dred Scott v. Sandford, 19 Howard 393, at 462, 460 (March 6, 1857); cited hereafter simply as Dred Scott case (with page reference). Furthermore, Nelson went on to treat federal statutes on the same basis, despite the fact that they are, by constitutional definition, part of "the supreme Law of the Land," binding "the Judges in every State . . . , any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, clause 2. Oblivious to the difference between a federal law operating within the jurisdiction of a member state and a state law operating within the jurisdiction of a fellow state, he rejected the idea that the federally enacted Missouri Compromise (assuming it to be valid) "possessed some superior virtue and effect, extra-territorially, and within the State of Missouri, beyond that of the laws of Illinois, or those of Ohio." Dred Scott case, 463. Nelson did not rule on the constitutionality of the Missouri Compromise; hence he did not involve himself in the flagrant one-sidedness of a majority of his brethren, who accepted his reasoning and then combined it with their own, which concluded that the laws of a slaveholding state followed the slaveowner and protected his property whenever he went out from his own state into the territories that were under federal jurisdiction.

101. Quoted by Thomas Hardeman, Jr. (Ga.), H.R., April 12, 1860. *Globe,* 36 Cong., 1 Sess., App., 223.

102. Senate, Jan. 11, 1860. *Globe,* 36 Cong., 1 Sess., App., 78.

ereign's immunity from all external control. Beyond their borders, however, they were demanding — as sovereigns — the strictest respect for whatever rights they chose to place beneath the protective mantle of their sovereignty.

Such a view of the Constitution wiped out every policy-making function of the federal government. Its powers were converted from legislative to ministerial ones. Congress was to provide ways and means, it was not to deliberate upon ends. The President was not to shape policy but simply to execute the laws. Federal coercive authority, nevertheless, would be kept in being, for the extra-territorial claims of the slaveholding states would collapse without it. But the only branch of the federal government whose powers were to be exalted was the judiciary. The courts were obliged to take their cue directly from the Constitution. They were free to disregard the directives of possible antislavery majorities in the other branches. They could thus be expected to enforce the sweeping mandate that proslavery leaders found in the Constitution — a mandate to safeguard, under all circumstances, the constitutionally recognized institution of slavery.

This reliance upon the judiciary — indeed, this almost exclusive reliance — was inevitable, and gave to proslavery constitutional theory its highly legalistic tone. Of the three branches of the federal government, the legislative was least to be trusted. Antislavery majorities could already be mustered in the House of Representatives, and sooner or later would be in the Senate. Therefore no discretionary power over slavery could safely be left in the hands of Congress; its every act must be predetermined, so far as aim or purpose was concerned, by the Constitution and by judicial decision. For the moment, the situation in the executive branch was more favorable. Throughout the period of controversy — especially during the administrations of Polk, Pierce, and Buchanan (1845-1849 and 1853-1861) — the proslavery faction were generally successful in committing the President to the policies they demanded. Nevertheless, this control was jeopardized at every election — indeed, the loss of the executive branch to the Republicans in 1860 was obviously a major reason for secession. Executive discretion ultimately was no more to be tolerated than legislative. Only the federal judiciary could be trusted to defend slavery in an active way. The idea that the Supreme Court could not make — and was

not, in fact, making — national policy about slavery was a transparent fiction. But it was a useful fiction, from the southern point of view, for it meant that the court was under no obligation to reflect the views of popular majorities. Policy would be made *for* the nation, but not *by* the nation. Power would be neatly divorced from accountability, action from deliberation.

The Dred Scott Decision

This reliance upon the judiciary paid off in the most important of all the decisions on slavery — that in the case of Dred Scott, decided on March 6, 1857. The ultimate doctrine of state sovereignty, with all its extra-jurisdictional corollaries fully developed and applied, received its most authoritative formulation at the hands of Chief Justice Roger B. Taney, who wrote the opinion of the court in the case. Space does not permit an examination of the many points of this complex and fateful decision. But the heart of Taney's opinion, from the constitutional point of view, was his delineation of the nature of the Union and the conclusions he drew therefrom respecting the power of Congress in the territories and particularly its power over slavery.

The case involved a slave, Dred Scott, who had been taken by his master for an extended sojourn or residence in areas where slavery was forbidden by statute — for two years in the free state of Illinois and for two in that portion of the old Louisiana Purchase which lay north of 36° 30′, and in which slavery had been prohibited by the federally enacted Missouri Compromise of 1820. Having been brought back to the slaveholding state of Missouri, Dred Scott was suing for his freedom in the federal courts. His suit was denied on several grounds. What concerns us here is the pronouncement that Congress lacked constitutional authority to prohibit slavery in the territories, as it had attempted to do in the Missouri Compromise. Each of the nine justices filed a separate opinion. Seven concurred in the final result: that Dred Scott was still a slave. Only six held that the Missouri Compromise was invalid. And only five accepted Taney's reasoning that the measure was actually unconstitutional. The five, nevertheless, constituted a majority of the entire court; hence the constitutional theory about to be discussed became authoritative.[103]

103. Dred Scott case, 393. In the opinion of the court, Chief Justice

Turning to the written Constitution, Taney could find in it no delegation to the federal government of powers of local government, even over areas that formed no part of any existing state. He denied that such powers were conferred by the clause authorizing Congress to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Instead of arguing (as most defenders of state sovereignty had done) that the words were inadequate to convey the powers in question, Taney took the curious position that the clause applied only to territory already in the possession of the United States at the time the Constitution was adopted.[104] The effect (and obviously the intent) of this interpretation was to deny the applicability to the territories

Taney (Md.) denied the constitutionality of federal legislation prohibiting slavery in the territories (our present concern) in a lengthy discussion, 431-52. The two dissenting justices, John McLean (Ohio) and Benjamin R. Curtis (Mass.) controverted his views on this point, 538-50 and 604-33, respectively. Of the six justices who agreed with Taney that Dred Scott was still a slave, one, James M. Wayne (Ga.) gave his "unqualified assent" to all Taney's arguments, 454-56. Another, Robert C. Grier (Pa.) concurred specifically with Taney's reasoning on the unconstitutionality of the Missouri Compromise, 469. Two others, Peter V. Daniel (Va.) and John A. Campbell (Ala.) argued this particular point afresh, without, however, departing significantly from Taney's line of argument, 487-92 and 500-517, respectively. Accordingly, five of the nine justices subscribed to the doctrines discussed in the text above. One other justice, John Catron (Tenn.), believed the Missouri Compromise invalid rather than unconstitutional, because incompatible with the treaty that ceded Louisiana, and he took emphatic exception to certain of Taney's assertions denying congressional power over the territories, 519-29. The remaining justice, Samuel Nelson (N.Y.), held Dred Scott to be a slave for reasons that did not call the Missouri Compromise in question, 457-69.

Aside from certain technical questions, two other major points were ruled on by the court. (i) Nelson, in an opinion originally prepared to serve as that of the court, rested the case on the principle that it was for the courts of Missouri to decide Dred Scott's status after his return to that state, and hence to determine the effect to be given to his residence on free soil. The precedent for this was the decision in Strader v. Graham, 10 Howard 82 (1850). Seven of the nine members of the court were in agreement on this point. (ii) Taney held that a Negro could not, under any circumstances, be a citizen of the United States and hence that Dred Scott could not sue in the federal courts even if he were free. Only Wayne and Campbell agreed. McLean and Curtis dissented.

The literature on the Dred Scott case is too enormous for discussion here. Mention should be made, however, of Vincent C. Hopkins, *Dred Scott's Case* (New York, 1951).

104. Dred Scott case, 432.

generally of the antislavery precedent set in the Northwest Ordinance of 1787.

Having rejected as a basis for his argument the one clause in the Constitution that made any reference to territory, Taney furnished himself with the kind of provision he needed by a wholesale discovery of implied powers, reminiscent of the most spacious opinions of John Marshall. The United States had, of course, acquired vast territories without benefit of an explicit grant of power to do so. Since Jefferson himself had swallowed his constitutional scruples in the matter when he consummated the Louisiana Purchase in 1803, no one thereafter was bothered by such scruples.[105] Nevertheless, the possessions so acquired had presumably been sold, as well as governed, by virtue of the clause that spoke of "Rules and Regulations respecting the Territory." Not so, said Taney. The clause in question could not be stretched to include possessions acquired after 1787. Accordingly, Congress had been selling the public land without any written authority from the Constitution. Its power to sell, as well as its power to govern, was inferred from its power to acquire, and this in turn was inferred from the fact that the United States was an independent nation, and, like other nations, an acquisitive one.[106] The Dred Scott decision was a masterpiece of broad construction before Taney changed his course and made it also a masterpiece of strict construction.

The power to govern the territories being an implied power, and not a power derived from the written clause respecting territory, Taney was free to define the power in any way he saw fit. And he saw fit to define it in terms of the dualism we have already examined. Until a territory is ready for statehood, Taney asserted, "it is undoubtedly necessary that some Government should be estab-

105. See Andrew C. McLaughlin, *A Constitutional History of the United States* (New York, 1935), 294-98.

106. In the Insular Cases following the Spanish-American War, the power to govern, implied from the implied power to acquire, became the basis for a ruling that (in the popular phrase of the time) the Constitution does not follow the flag. "We are also of opinion that the power to acquire territory by treaty implies, not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the 'American empire.'" In other words, "the Constitution is applicable to territories acquired by purchase or conquest only when and so far as Congress shall so direct." Downes v. Bidwell, 182 U.S. 244, at 279 (May 27, 1901).

lished, in order to organize society, and to protect the inhabitants in their persons and property." This statement was implicitly restrictive, describing as it did a government with the barest minimum of functions. In establishing this minimal government, moreover, Congress was not acting in its normal capacity as the federal legislature. It was acting simply as agent of the several states, charged with preserving their interests. Taney expressed the idea thus:

> As the people of the United States could act in this matter only through the Government which represented them, . . . it was not only within the scope of its powers, but it was its duty to pass such laws and establish such a Government as would enable those by whose authority they acted to reap the advantages anticipated from its acquisition.[107]

This was the concept of trusteeship. The term itself had already appeared in another crucial passage:

> Whatever it [the general government] acquires, it acquires for the benefit of the people of the several States who created it. It is their trustee acting for them, and charged with the duty of promoting the interests of the whole people of the Union.

The territory, he reiterated, "was acquired by the General Government, as the representative and trustee of the people of the United States, and it must therefore be held in that character for their common and equal benefit."[108]

This distinction between legislative power and trusteeship was vital to Taney's argument. If Congress were authorized to legislate (in the full sense) for a territory, then it would stand in the same relation to the people of the territory as a state legislature stands in relation to the people of the state.[109] It could make policy with respect to the domestic and local institutions of the area. It would

107. Dred Scott case, 448.

108. *Ibid.* See also Daniel's concurring opinion: "Congress was made simply the agent or *trustee* for the United States, and could not, without a breach of trust and a fraud, appropriate the subject of the trust to any other beneficiary . . . than . . . the people of the United States, upon equal grounds, legal or equitable." *Ibid.,* 489.

109. Marshall, indeed, had already held that in legislating for the territories, "Congress exercises the combined powers of the general, and of a state government." American Insurance Co. v. Canter, 1 Peters 511, at 546 (1828). Taney distinguished the case. Dred Scott, 444. Marshall's position is unquestionably that of present-day constitutional law. "In the territories, Congress has the entire dominion and sovereignty, national and local, and has full legislative power over all subjects upon which a State legislature might act." Corwin, ed., *Constitution . . . Analysis,* 703.

be empowered, as a state legislature was empowered, to decide upon the existence or nonexistence of slavery in the territory. On the other hand, if Congress were acting simply as trustee for the people of the several states, then it would enjoy no such freedom of decision on matters of policy. It could, of course, perform within the territories the ordinary federal functions that it performed within the states. Beyond this, however, its powers and duties in the territories were those of a temporary caretaker only. The normal legislative power bestowed upon Congress extended only to purely federal matters. No powers of local government — no police powers — were included. Such powers as might be indispensably necessary for the maintenance of order would have to be implied. But these had neither the character nor the scope of the constitutionally delegated powers of Congress. The implied power to provide government for a territory was drastically and peremptorily restricted by the concept of trusteeship.

From this premise, Taney's specific conclusions easily followed. In devising the mere machinery of government, Congress was relatively free to use its judgment. In legislating on substantive matters, however, it was permitted no discretion and no power of decision of its own. "The power of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of Government."[110] Therefore "citizens of the United States who migrate to a Territory belonging to the people of the United States, cannot be ruled as mere colonists, dependent upon the will of the General Government, and to be governed by any laws it may think proper to impose."[111]

The federal government, admittedly, was duty-bound to preserve order and protect property. But it was obliged to do so, Taney insisted, in such a way as not to infringe upon any property right enjoyed by an American citizen by virtue of the laws of his own state. Ordinary civil and criminal laws, if common to all the states of the Union, might presumably be enacted by Congress for the territories. But laws that infringed upon a property right recognized by any state would be *ultra vires*. The holding of slaves was obviously such a state-protected property right. No distinction between slave property and other property was authorized by the

110. Dred Scott case, 449.
111. Dred Scott case, 447.

Constitution, Taney continued, and none could be made by Congress.[112] Accordingly, a federal statute abolishing slavery in a territory was, under any and every circumstance, unconstitutional. The Chief Justice drove the point home by citing — for almost the first time in constitutional adjudication, though not for the first time in the debates over slavery[113] — the Fifth Amendment (and especially its "due process" clause) in defense of vested property rights. "An act of Congress," he asserted, "which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law."[114]

Proslavery Demands in 1860

Upheld in their constitutional views by the Dred Scott decision of 1857, defenders of slavery worked out with logical com-

112. "If the Constitution recognises the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction." Dred Scott case, 451. In his concurring opinion, however, Daniel insisted that the Constitution did make a distinction, placing property in slaves *above* other property. "The only private property which the Constitution has *specifically recognised,* and has imposed it as a direct obligation both on the States and the Federal Government to protect and *enforce,* is the property of the master in his slave; no other right of property is placed by the Constitution upon the same high ground, nor shielded by a similar guaranty." *Ibid.,* 490.

113. It was only a year earlier that the modern concept of "substantive due process" received clear formulation in a New York case, Wynehamer v. People, 13 N.Y. 378 (1856), involving a liquor law. The decision is characterized as "epoch-making" by Rodney L. Mott, *Due Process of Law* (Indianapolis, 1926), 317-18. Taney, who cited no precedents, is often assumed to have had the Wynehamer case in mind, and his application of the Fifth Amendment to vested property rights in slaves is usually regarded as a striking innovation. As early as 1832, however, in the debates that occurred in the Virginia General Assembly over a proposal for gradual emancipation, James H. Gholson argued that any measure taking slaves from their masters would violate property rights protected both by the Virginia Constitution and by the Fifth Amendment of the federal Constitution. He seems, it is true, to have emphasized the clause reading "nor shall private property be taken for public use, without just compensation," rather than the due process clause. See Theodore M. Whitfield, *Slavery Agitation in Virginia, 1829-1832* (Baltimore, 1930), 77.

114. Dred Scott case, 450.

pleteness the program which they insisted the federal government must carry out. The final formulation was in a set of resolutions that Jefferson Davis introduced in the Senate on February 2, 1860, and that he pushed through to adoption on May 24 and 25. The resolutions began by reciting the orthodox postulate of state sovereignty: "that in the adoption of the Federal Constitution, the States adopting the same acted severally as free and independent sovereignties."[115] But the document mounted quickly to a climax in the fourth resolution, which demanded that the powers of the central government be exerted to any extent necessary to safeguard slavery throughout all the territories. In Davis's original draft, the section read as follows:

Resolved, That neither Congress nor a territorial legislature, whether by direct legislation or legislation of an indirect and unfriendly nature, possess the power to annul or impair the constitutional right of any citizen of the United States to take his slave property into the common territories, but it is the duty of the federal government there to afford, for that as for other species of property, the needful protection; and if experience should at any time prove that the judiciary does not possess power to insure adequate protection, it will then become the duty of Congress to supply such deficiency.[116]

Davis's resolutions, an election-year manifesto, were adopted in May, 1860. Six months later the election returns were in. The victory of Lincoln and the Republican Party destroyed every hope of achieving the proslavery program for the territories that Jefferson Davis had laid down in the spring. Even without control of Congress, the incoming Republican President would wield powers capable of blocking any measure for protecting slavery in the territories. His veto could strike down a federal slave code, should

115. Senate, 36 Cong., 1 Sess., *Journal,* 113 (Feb. 2, 1860).

116. *Ibid.* On March 1, 1860, Davis substituted a revised, but by no means weakened, text, which divided this resolution into two. *Ibid.,* 203. The revised resolutions were adopted by the Senate on May 24-25, 1860. *Ibid.,* 507-10, 513-18. Horace Greeley labeled them the "Democratic Platform, Adopted by the United States Senate." Horace Greeley and John F. Cleveland, eds., *A Political Text-Book for 1860* (New York, 1860), 194-97. The views, of course, were not those of the Democratic Party as a whole, but of its southern faction. When the latter nominated John C. Breckinridge for the presidency on June 28, 1860, the first two planks of its platform simply paraphrased Davis's crucial resolution, avoiding the contentious word "slave." Porter and Johnson, *National Party Platforms,* 31.

Congress seek to enact one, and his power to appoint and remove territorial governors (each armed with a veto power) could forestall similar action by territorial legislatures. If Stephen A. Douglas was right when he said that slavery could not exist in a territory without positive legislation in its favor,[117] then slavery in the territories could hardly survive even the calculated *in*action of a Republican administration. Lincoln's election was hardly "an immediate menace to slavery in the states" (as some writers have argued[118] with scanty supporting evidence), but it was indubitably an immediate menace to slavery *in the territories.* And the throttling of slavery in the territories would mean — according to the professed beliefs of opponents and defenders of slavery alike — the ultimate extinction of the institution everywhere. When the election of 1860 ended the possibility of federal protection for slavery in the territories, the principal leaders of the proslavery party chose, or accepted, the long-discussed alternative of secession.

Secession, however, was not in itself a program for the positive protection of slavery. Secession could not be an end in itself. It made sense only as the means to an end. And the end, unconcealed, was to create a new constitutional system, with built-in protection for slavery. To see the character of that system we have only to look at the permanent Constitution of the Confederate States of America, adopted on March 11, 1861.

The Confederate Constitution and Slavery

It has been conventional to say, with Nathaniel Wright Stephenson, that the framers of the Confederate Constitution "left unstated their most distinctive views."[119] The new document, it is true, was largely a scissors-and-paste redaction of the original Constitution of the United States and its amendments.[120] The

117. This was the essence of his "Freeport Doctrine": "It matters not what way the Supreme Court may hereafter decide as to the abstract question whether slavery may or may not go into a territory under the constitution, the people have the lawful means to introduce it or exclude it as they please, for the reason that slavery cannot exist a day or an hour anywhere, unless it is supported by local police regulations." Douglas, speech in debate at Freeport, Aug. 27, 1858, in Lincoln, *Collected Works,* III: 51.

118. Notably J. G. de Roulhac Hamilton, cited in n. 20 above.

119. Stephenson, *The Day of the Confederacy* (New Haven, 1919), 10 n.

120. The texts of the Constitution of the United States and of the permanent Constitution of the Confederate States of America are convenient-

seceding states, ironically enough, said nothing whatever in their Constitution about the right of secession. Though the preamble included the phrase "each State acting in its sovereign and independent character," the actual restrictions placed upon the powers of the states were almost precisely what they had been in the old Constitution. The general government had slightly less power in certain respects and slightly more in others; on balance, the relative influence of the central government and the states was about the same as before.[121]

On one matter, however, the "distinctive views" of the framers were completely worked out. With respect to the extra-jurisdictional claims of slavery — particularly, its claim to protection throughout the territories — the Confederate Constitution left nothing to surmise or to chance. It spelled out every one of the crucial demands that proslavery leaders had made. But — and this is the most striking fact of all — once these demands were incorporated in the written Constitution, the state-sovereignty theory of the territories was quietly jettisoned. With respect to slavery, the Confederate Constitution created a much more "consolidated" union than any which antislavery leaders had been accused of desiring.

Partisans of slavery had denied that the old Constitution gave to Congress the power to legislate for the territories. Instead of clearing up the doubtful point by specifically denying Congress the disputed power and reserving it to the states, the framers of the Con-

ly printed in parallel columns, with differences indicated by italics, in App. K of Jefferson Davis, *Rise and Fall of the Confederate Government,* I: 648-75.

121. For example, protective tariffs, bounties, and federal appropriations for internal improvements were prohibited (Art. I, sec. 8, clauses 1 and 3), but export duties were permitted by two-thirds vote of both houses (Art. I, sec. 9, clause 6) and amendments to the Constitution required ratification by two thirds instead of three fourths of the states (Art. V, sec. 1). The phrase about "general welfare" was omitted from the grant of financial powers, but the "necessary and proper" clause was retained intact (Art. I, sec. 8, clauses 1 and 18). On the one hand, a state legislature might impeach a federal officer "resident and acting solely within [its] limits" (Art. I, sec. 2, clause 5); on the other, the power of the federal executive was enhanced by giving the President the power to veto individual items in an appropriation bill (Art. I, sec. 7, clause 2), by requiring a two-thirds vote of both houses to appropriate money not asked by him (Art. I, sec. 9, clause 9), by giving him an explicit removal power (Art. II, sec. 2, clause 3), and by authorizing Congress to grant Cabinet members a seat on the floor (Art. I, sec. 6, clause 2).

federate Constitution did precisely the opposite. They *granted* their Congress the power in set terms. After revising the old clause about "all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," so that it would refer clearly to real estate,[122] they went on to add a new paragraph, the first sentence of which reads as follows:

> The Confederate States may acquire new territory; and Congress shall have power to legislate and provide governments for the inhabitants of all territory belonging to the Confederate States, lying without the limits of the several States; and may permit them, at such times and in such manner as it may by law provide, to form States to be admitted into the Confederacy.[123]

This was a grant of precisely the power which Republicans had insisted, all along, that the federal government did and must possess. Abandoned completely was the state-sovereignty argument that the federal government was, with respect to the territories, merely the trustee of the several states. The Confederate Constitution wiped out, at a stroke, the theory of the Union on which the Dred Scott decision had rested.

The reason for abandoning the state-sovereignty theory of the Union becomes obvious when one reads the rest of the clause just quoted. The following sentence completes the paragraph:

> In all such territory, the institution of negro slavery, as it now exists in the Confederate States, shall be recognized and protected by Congress and by the territorial government; and the inhabitants of the several Confederate States and Territories shall have the right to take to such Territory any slaves lawfully held by them in any of the States or Territories of the Confederate States.[124]

The institution of slavery was now placed, firmly and unequivocally, under *national* protection. The state-sovereignty theory of the territories, so long the basis of proslavery demands, had served its purpose. It was now not only useless but potentially harmful. It might conceivably weaken the centralized safeguards for slavery newly provided.

122. ". . . all needful rules and regulations concerning the property of the Confederate States, including the lands thereof." Art. IV, sec. 3, clause 2.

123. Art. IV, sec. 3, clause 3, sentence 1.

124. *Ibid.*, sentence 2.

Any danger to slavery from the policy of nationalization was effectually prevented by one new constitutional restriction on federal power. The Confederate Congress was forbidden to pass any "law denying or impairing the right of property in negro slaves."[125] Moreover, the new Constitution guaranteed to slaveowners extra-jurisdictional rights throughout the Confederacy — not only in the territories but within the member states as well. Citizens of each state were entitled to "the right of transit and sojourn in any State of this Confederacy, with their slaves and other property; and the right of property in said slaves shall not be thereby impaired."[126] Finally, the fugitive-slave clause was enlarged to cover slaves "lawfully carried into" another state, as well as those escaping to it.[127] No law of any state, according to the new provision, could work the emancipation of a foreign-owned slave found upon its soil, no matter how the slave had come there.

One element of state sovereignty theoretically remained. A state was not forbidden to abolish slavery. It is difficult to say, however, exactly what the abolition of slavery by a single state could have actually meant, in the context of the Confederate Constitution. No time limit was specified in connection with the right of transit and sojourn. Any Confederate statute that prescribed the duration of a slaveowner's sojourn with his slaves in a state that had "abolished" slavery would undoubtedy run afoul of the provision forbidding any law "impairing the right of property in negro slaves." At the same time, a state statute that gave freedom to slaves who had been kept within its limits longer than a specified

125. Art. I, sec. 9, clause 4.

126. Art. IV, sec. 2, clause 1.

127. Art. IV, sec. 2, clause 3. Jefferson Davis embodied all these provisions in a proposal to amend the Constitution of the United States, which he presented to the Senate on Dec. 24, 1860: "*Resolved,* That it shall be declared, by amendment of the Constitution, that property in slaves, recognized as such by the local law of any of the States of the Union, shall stand on the same footing in all constitutional and Federal relations as any other species of property so recognized; and, like other property, shall not be subject to be divested or impaired by the local law of any other State, either in escape thereto, or of transit or sojourn of the owner therein; and in no case whatever shall such property be subject to be divested or impaired by any legislative act of the United States, or of any of the Territories thereof." *Globe,* 36 Cong., 2 Sess., 190. Less than a month later Davis vacated his seat after announcing the secession of his state, Mississippi. *Ibid.,* 487 (Jan. 21, 1861).

time would certainly violate the Constitution, which forbade a state to discharge from service or labor a slave "lawfully carried into" it. Presumably a state might forbid its own citizens to possess slaves, but it could do little else. The state could not constitutionally exclude slaves or compel foreign slaveowners to remove or emancipate them. And it could hardly regulate the use to which such imported slaves might be put without transgressing one or another of the injunctions of the Confederate Constitution.

Slavery was no longer a local institution, the Confederate Constitution made it a national one. With respect to slavery the Confederacy was a unitary, consolidated, national state, denying to each of its allegedly sovereign members any sort of local autonomy with respect to this particular one among its domestic institutions.

Concluding Reflections

In the long aftermath of the Civil War, leaders of the former Confederacy built up an elaborate apologia explaining what they had been about. Central to their thesis was the assertion that the South had contended, single-mindedly and consistently, for one basic constitutional philosophy — the philosophy that opposed centralization and exalted local self-government. Writing in 1868, Alexander H. Stephens of Georgia, Vice-President of the Confederate States, declared that "this whole subject of Slavery, so-called, in any and every view of it, was, to the Seceding States, but a drop in the ocean compared with . . . other considerations."[128] These were, in the highest and purest sense, constitutional considerations. The war, he maintained, resulted from the prolonged resistance of the South to "the assumption on the part of the Federal authorities, that the people of the several States were . . . citizens of the United States, and owed allegiance to the Federal Government, as the absolute Sovereign power over the whole country, consolidated into one Nation."[129]

A Lost Cause must have its myths. But before myths became necessary — before the cause became a lost one — Alexander H. Stephens saw just as clearly, and stated just as openly, as any other southern leader, the question at issue. On March 21, 1861, six

128. Stephens, *Constitutional View of the Late War between the States*, I: 542.

129. *Ibid.*, 29.

weeks after his election to the second highest post in the new Confederate government, Stephens delivered at Savannah what was thereafter known as his "corner-stone speech." Eulogizing the frame of government just erected, he said:

> The new constitution has put at rest, *forever,* all the agitating questions relating to our peculiar institution — African slavery as it exists amongst us — the proper *status* of the negro in our form of civilization. This was the immediate cause of the late rupture and present revolution.

Explicitly repudiating the antislavery sentiments of Thomas Jefferson, Stephens continued:

> The prevailing ideas entertained by him and most of the leading statesmen at the time of the formation of the old constitution, were that the enslavement of the African was . . . wrong in *principle,* socially, morally, and politically. . . . This was an error. . . .
>
> Our new government is founded upon exactly the opposite idea; its foundations are laid, its corner-stone rests upon the great truth, that the negro is not equal to the white man; that slavery — subordination to the superior race — is his natural and normal condition.
>
> This, our new government, is the first, in the history of the world, based upon this great physical, philosophical, and moral truth.[130]

Alexander H. Stephens was speaking, in 1861, with complete understanding and complete accuracy. The drafters of the Confederate Constitution had added to the document they inherited only such provisions as they deemed essential for securing to themselves and their posterity the blessings they had given up hope of securing within the old Union. What these blessings were supposed to be, the Confederate Constitution made crystal clear. Its people were to enjoy the privilege of living — to use Stephens's carefully chosen words — under a government, the first in the history of the world, whose foundations were laid, whose cornerstone rested, upon the great philosophical and moral truth that the enslavement of one part of the human race is not a wrong but the opposite of a wrong — that slavery is the natural and normal condition of the colored races of the world. To build this principle into the very

130. Corner-Stone Speech, March 21, 1861, reprinted in Henry Cleveland, *Alexander H. Stephens, in Public and Private: With Letters and Speeches* (Philadelphia, 1866), 721. Stephens gave excerpts from this speech in his *Constitutional View,* II: 85-86, 521-24, but did not include the passages quoted here.

fabric of a new government was the purpose of the Confederate Constitution. To build it into the fabric of the old government had been the purpose of the constitutional theorists who elaborated the doctrine of state sovereignty before 1860.

State sovereignty, as I have already said, was a doctrine of power, not a doctrine of rights. Any contention that it operated to safeguard the *rights* of minorities is utterly specious.[131] What the theory did attempt to safeguard was the *power* of a regional elite, which happened to find itself a minority in the nation as a whole. And the power that was to be sustained included the power to domineer over all minorities within the ambit of authority and influence of this privileged group or class. By employing the high language of sovereignty, moreover, they were demanding a power that would be absolute, unquestioned, and uncontrolled.

State sovereignty was a theory designed not to protect but to override individual rights. This was the character of the doctrine during the crisis of 1846-1860, when its obvious purpose was to perpetuate a system that kept human beings in bondage, thus denying them the elementary right of freedom. This is the character of the refurbished doctrine today, when its obvious purpose is to perpetuate a system of racial segregation that denies to men and women of color the right to that "equal protection of the laws" which the Constitution of the United States explicitly guarantees.

131. The most respectable statement of this curious, but widely accepted, interpretation is by Jesse T. Carpenter. Writing in 1930, he said: "No problem is more pressing in governments of the people and by the people than the problem of minorities. If in a democracy political power resides in numbers, what rights, if any, has a minority to impose restraints upon the will of a numerical majority?" No one can deny the profound importance of the question, but one can well doubt Carpenter's assumption that a relevant answer can be found by conceiving "of the Old South as a sectional minority consciously striving for seventy odd years to evolve an adequate philosophy of protection to its interests in the American Union." His conclusion can only be described as fantastic: "Here in the first great experiment in democracy is found the first thorough treatment of democracy's greatest problem: the relation of numerical majority rule to effective minority protection." Carpenter, *The South As a Conscious Minority, 1789-1861* (New York, 1930), 3.